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Quantum Meruit: Residual Equity in Law

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ARTICLE

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TABLE OF CONTENTS

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INTRODUCTION

Quantum meruit is a legal action based on equitable restitution. It is, among other things, an alternate remedy to an action on a contract which can be brought for partial performance. It is very much an alternative "shadow" system. A law student who first encounters it in Contracts I often feels like the biology student who is told that, in addition to a circulatory system, there is also a lymphatic system hidden within the circulatory system. Quantum meruit can best be described as residual equity — a place to turn when there has been partial performance of a contract in a tricky new substantive area or where unfairness would result from contract enforcement. It is not accidental that this Article has been written by a woman law professor. Such an interest in residual equity was predicted by Carrie Menkel-Meadow in *Portia in a Different Voice: Speculations on a Women's Lawyering Process*,[1] when she noted that equity, as the flexible part of the system, represents the more feminine voice, while law, which has rules limiting discretion, represents the more masculine voice. Menkel-Meadow also noted that one of the problems in the present legal structure is that the dominant male voice often undermines the female voice of flexibility. As this Article goes from the early development of quantum meruit to current applications, the reader should be sensitive to the fact that the early flexibility has become rule-bound; however, flexibility has been maintained in the sense that courts turn to equity-based quan-

1. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 39-40 (1985).

tum meruit when all else fails, for example, when courts face new questions such as palimony or newly recognized clients' rights when sued by attorneys for contingency fees.

Procedurally, quantum meruit is the name of a legal action brought to recover compensation for work done and labor performed "where no price has been agreed."[2] The term literally means "as much as is deserved"[3] and often can be seen as the legal form of equitable restitution. While the history of restitution generally was delineated by the development and drafting of the *Restatement of Restitution* in 1937,[4] the development of quantum meruit itself has never been clearly described or reported. In spite of this lack of historical perspective and the confusion this void has caused, quantum meruit has experienced a burgeoning number of applications in twentieth-century American law in cases concerning physicians' fees, attorneys' fees, government contracts, and the recently evolving domestic relations category often referred to as "palimony."[5] While the courts have developed unique rules for each of these situations, the doctrinal underpinnings in quantum meruit remain.

The emergence of quantum meruit occurred at the same time the action of assumpsit was expanding. Initially, most of the major quantum meruit developments took place in trades of common calling (e.g., innkeeper, tailor, etc.), as the law exerted more control over these positions. The forms of pleading in assumpsit were also being simplified, and the "common counts," which included a claim for "work and labor performed," eventually were available for any claim of indebtedness for services performed.[6] This was true regardless of whether the claim was based on an express, implied-in-fact, or implied-in-law contract.

With such traditional confusion concerning the use of restitutionary terms and remedies such as quantum meruit in both legal scholarship and court opinion, there arises an obvious fear that with the developing official recognition and application of restitution in

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2. JOHN H. MUNKMAN, THE LAW OF QUASI-CONTRACTS 87 (1950). Munkman adds the requirement that there have been no agreed upon price for the work or labor, but as will be discussed, this may not always be the case.

3. BLACK'S LAW DICTIONARY 1243 (6th ed. 1990): "The common count in an action of assumpsit for work and labor, founded on an implied *assumpsit* or promise on the part of the defendant to pay the plaintiff *as much as he* reasonably *deserved* to have for his labor." *Id.*

4. 1 GEORGE E. PALMER, THE LAW OF RESTITUTION 4 (1978).

5. *See infra* text accompanying notes 196-374 (analyzing quantum meruit as applied to physicians' fees, attorneys' fees, government contracts, and palimony, respectively).

6. 1 PALMER, *supra* note 4, at 7.

American law, the confusion and misapplication of the above concepts will be even further perpetuated. Ironically, at least one legal publication has gone so far as to say that quantum meruit is "practically obsolete,"[7] a characterization belied by current developments. While quantum meruit claims are often (but not always) in restitution, many of the guiding principles are unique.[8] With such in mind, it is the purpose of this work to first examine the history of quantum meruit. A discussion of the re-emergence and practical application of quantum meruit in twentieth-century contract law and the unique uses of quantum meruit in the areas of physicians' fees, lawyers discharged under contingency contracts, government contracts, and palimony will follow.

I. THE HISTORY AND PRINCIPLES OF QUANTUM MERUIT

A. Preliminary Matters

In order to understand quantum meruit, there are some "explicative concepts" which must be discussed.[9] These related terms must be fully comprehended because they are often used to describe restitution and quantum meruit; additionally, many authors, law professors, and judges who casually apply these terms, often incorrectly, to the explication of these and other legal subjects, assume that the readers, students, or litigants already understand the meanings of the terms. In order for this work to be complete and for the reader to have a reference for understanding what is to follow in later sections, such terms must be given adequate explanation. These terms are: actions at law, actions in equity, contracts implied in law (often referred to as quasi-contracts), contracts implied in fact, expectancy, reliance, restitution, and general assumpsit.[10]

1. Actions "At Law" and Actions "In Equity"

The two concepts of "actions at law" and "actions in equity" are

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7. 7 C.J.S. *Action of Assumpsit* § 3 (1980). George Palmer's treatise *The Law of Restitution* does not even index the term quantum meruit. 1 PALMER, *supra* note 4.

8. Often quantum meruit can be seen as a form of *legal* restitution, following the basic restitutionary principle of preventing unjust enrichment. Quantum meruit, however, can also be utilized to establish an alternative value for partial performance under a contract. *See infra* text accompanying notes 179-95.

9. The term "explicative" does not imply that these terms exist only to explain restitution and quantum meruit; they may be employed in other completely independent contexts, as well as existing as independent concepts of their own.

10. See *infra* text accompanying notes 141-51 for a discussion of general assumpsit.

the result of England's historical development of remedies.[11] Common law courts began as a result of the Magna Carta, which declared that appeals to justice should no longer be the business of the king alone.[12] Justices were appointed by the king to hear "common pleas."[13] At the same time, there still remained a "privy council" — a select group of the king's highest officers, headed by the king himself, who presided over applications for royal discretion in criminal and civil matters.[14] One such officer was the chancellor, who was the keeper of the royal seal.[15] At first the Chancery, over which the chancellor presided, handled matters concerning royal documents such as charters, writs, and grants.[16] Eventually, however, the duties of the chancellor became more judicial in nature. Citizens who could not find an adequate remedy in the common law court system would often appeal directly to the king and his council, and the custom eventually developed where the king channeled royal petitions that requested unique remedies directly to the chancery.[17]

During the reign of Edward III, the court of the chancery evolved into a distinct court where matters of royal "grace and favor" were remedied.[18] Although the court of the chancery was developed as more of a royal "catch all" when the common law courts failed to provide a remedy, it eventually became a distinct and independent forum. The inflexibility and rigidity of common law, its arduous procedures, and the inadequacy of its remedies drove people to the chancellor as a court of *first* resort.[19] While the common law courts were locked into their own precedents "at law" and acted in rem,[20] the chancery court, acting in personam,[21] could adapt its law, proce-

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11. ARCHIBALD H. THROCKMORTON, HANDBOOK OF EQUITY JURISPRUDENCE 1-9 (2d ed. 1923).

12. *Id.* at 5.

13. *Id.*

14. *Id.* at 5-6.

15. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 85 (2d ed. 1979). "The chancellor has always been primarily an officer of state and a minister of the crown. Most medieval chancellors were also bishops or even archbishops. Some chancellors, notably Cardinal Wolsey (1515-29) and Lord Clarendon (1658-67), were prime ministers in all but name." *Id.*

16. *Id.* at 84.

17. THROCKMORTON, *supra* note 11, at 7.

18. *Id.* at 8. The reign of Edward II was from 1327 to 1377.

19. *Id.* at 9.

20. "In rem" literally means "against the thing." BLACK'S LAW DICTIONARY 793 (6th ed. 1990). The term generally applies to disputes concerning property. *Id.*

21. "In personam" literally means "against the person." *Id.* at 791. By acting in personam, a court adjudicates a person's rights, rather than the disposition of property. *Id.*

dures, and remedies to new situations and thus provide an "equitable" (i.e., fair) result.[22] The end product was a legal system comprised of two independent fora: the common law, or "at law" courts, and the chancery, or "in equity" courts.[23]

Although the common law courts were later able to break out of their rigid molds and develop new pleas and remedies,[24] the chancery courts, or courts of equity as they became known,[25] retained most of their original procedures and jurisdiction, and still do in America today, especially in matters of fiduciary duty, fraud, mistake, and duress.[26] The American judicial system recognizes the law and equity distinction in a variety of ways. All federal courts have jurisdiction both at law and in equity but consider them together[27] in one form of action.[28] Some states have the same jurisdictional organization as the federal courts, while others still retain separate courts for actions in equity. The degrees of jurisdiction, pleas, and procedure also come in a number of forms,[29] but equity still remains the alternative to an action for which there is no plea or remedy at law.

Even though the rigid distinction between actions at law and suits in equity has been abolished, at least in part, there are important residual considerations. For example, in seeking an equitable remedy, even in the federal court context, inadequacy of a common law remedy must be pled.[30] Similarly, when requesting an injunction in a federal court, one must first allege an irreparable injury.[31] The

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22. THROCKMORTON, *supra* note 11, at 14. It must be noted that the chancery courts did not perceive themselves as applying their own form of law; rather, "[t]hey were making sure that justice was done in cases where shortcomings in the regular procedure, or human failings, rendered its attainment by due process unlikely." BAKER, *supra* note 15, at 87.

23. THROCKMORTON, *supra* note 11, at 15-16. There also existed a court system administered by the Church, or ecclesiastical courts. Its judgments were governed by Canon law, and its jurisdiction covered such areas as "family matters and wills, sexual offenses, defamation and breach of faith." BAKER, *supra* note 15, at 111-12. Some of their jurisdiction remained even until the nineteenth century. *Id.* at 114.

24. The common law courts' later development will be discussed further in the section on the historical development of quantum meruit. *See infra* text accompanying notes 141-51.

25. "Equity was a classical notion, defined by Aristotle as 'a correction of law where it is defective owing to its universality.'" BAKER, *supra*, note 15, at 90.

26. RESTATEMENT OF RESTITUTION pt. I, introductory note, at 9 (1937).

27. FED. R. CIV. P. 1. "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity . . . ." *Id.*

28. FED. R. CIV. P. 2. "There shall be one form of action to be known as 'civil action.'" *Id.*

29. THROCKMORTON, *supra* note 11, at 19.

30. *Id.* at 17.

31. FED. R. CIV. P. 65(b).

A temporary restraining order may be granted without written or oral notice to the

necessity of an inadequate legal remedy before an equitable plea is permissible can be traced to the competition between common law judges and equity's chancellor in the Tudor and Stuart revolutions of the sixteenth and seventeenth centuries.[32] The common law judges won the battle, hence the prerequisite of inadequate legal remedy.[33] A party could not go to a court of equity without first alleging that law was inadequate.[34]

2. *Contracts Implied in Law and Contracts Implied in Fact*

Actions at law and actions in equity should not be confused with "contracts implied in law" and "contracts implied in fact." The phrase "in law" may lead one to think that contracts implied in law are pled only at law. Not true. As a matter of fact, contracts implied in law have their doctrinal roots in equity.[35] Additionally, contracts implied in law are not merely the flip side of contracts implied

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adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that *immediate and irreparable injury, loss, or damage* will result to the applicant . . . .

Id. (emphasis added).

The requirement of irreparable injury means an injury unable to be "repaired" with legal damages. 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2944 (1973). The requirement that one must first find law inadequate before going to equity, while based on a sixteenth- and seventeenth-century English court struggle, is very much a part of modern federal practice.

32. ARTHUR ROSETT, CONTRACT LAW AND ITS APPLICATION 298 (4th ed. 1988).

33. *Id.*

During the Tudor and Stuart revolutions of the sixteenth and seventeenth centuries, the medieval order was replaced by an increasingly centralized national state. The limiting jurisdictional concepts of common law proved a constraint not only on judges but upon kings. The Crown and its bureaucratic servants became stronger and eventually claimed the right to rule absolutely without the restraints of law and the cumbersome procedures that lawyers fostered. In time, the law and professional lawyers became a major political opposition group opposing this new royal power. Judges and Chancellors competed for power and the common law insisted on its primacy. In the end the common lawyers won. Equity will not act in cases properly cognizable at law; if damages provide an adequate remedy, the Chancellor will not intervene.

Id.

34. It is important to note that:

The principles by which a person is entitled to restitution are the same whether the proceeding is one at law or in equity, although in some cases the limitations which the courts of law imposed upon themselves in rendering a judgment have prevented actions at law where restitution would be allowed in equity and in many situations a proceeding in equity is denied because the remedy at law is adequate.

RESTATEMENT OF RESTITUTION pt. I, introductory note, at 4 (1937).

35. The development of contracts implied in law will be explained further in the section on the historical development of quantum meruit. *See infra* text accompanying notes 152-62.

in fact.[36] Contracts implied in fact and contracts implied in law are fundamentally different, the former having an evidentiary base and the latter having a fictional base created by the courts to afford a remedy.[37] Contracts implied in fact are simply unwritten, nonexplicit *contracts* that are treated as express written contracts because the words or actions of the parties involved are based on some type of consensual transaction.[38] For example, suppose that A, a builder of houses, has loaded up trucks and bought materials to specification in order to build a house for B. B, in turn, has taken out a loan for a large sum. B, however, suddenly claims there is no contract and withdraws from the transaction. Although there may not have been an express written contract upon which A can sue, the actions of A, as well as the actions of B, blatantly appear to be based on a contract, and most courts would not hesitate to hold B liable under an implied-in-fact contract. Like an express contract, a contract implied in fact is one where both parties intended to contract (i.e., there was a meeting of the minds). The only thing absent from a contract implied in fact is the written agreement. An express contract is evidenced by express terms while an implied-in-fact contract is evidenced by facts and circumstances surrounding the situation.[39]

Contracts implied in law, on the other hand, "are in no sense genuine contracts."[40] They have been described as "all noncontractual obligations which are treated, for the purpose of affording a remedy, as if they were contracts."[41] There usually has been no meeting of the minds, no mutual consent. In general, most contracts implied in law involve the unjust enrichment of one party.[42] The court treats the situation as if it were a contract in order to give the injured party a remedy and prevent unjust enrichment of the other party.[43] The court (the law) implies a fictitious promise to pay where there was in fact no promise.[44]

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36. 3 WILLIAM H. PAGE, THE LAW OF CONTRACTS 2551 (2d ed. 1920).

37. Morse v. Kenney, 89 A. 865, 866 (Vt. 1914).

38. *Id.*; *see also* Wojahn v. National Union Bank, 129 N.W. 1068, 1077 (Wis. 1911) (stating that a contract implied in fact differs from an express contract only in the methods of proof).

39. Columbus, H.V. & T. Ry. v. Gaffney, 61 N.E. 152, 153 (Ohio 1901).

40. FREDERIC C. WOODWARD, THE LAW OF QUASI CONTRACTS 6 (1913).

41. *Id.* at 1.

42. Implied-in-law "contractual" obligations can also be based "[u]pon a record" and "[u]pon a statutory, or official, or customary duty." WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 16 (1893).

43. 1 PALMER, *supra* note 4, at 3.

44. Morse v. Kenney, 89 A. 865, 866 (Vt. 1914).

While the actual consensual transaction is absent, the rigidity of Anglo-American legal thought requires some tangible basis for enforcement of an implied-in-law contract. Without explicitly admitting that this method of remedy is one with its real base in fairness, the court imposes a "fictional" promise into the situation — where there was in fact none at all.[45] Thus, once the court has interjected such a promise against the enriched party, it has a contract it can enforce. In a truer sense, the court can force the fictionally breaching party (i.e., the enriched party) to perform; the performance required is to compensate the injured party.[46] Woodward, in his work *The Law of Quasi Contracts*, stated that there are only two "essential elements" of a contract implied in law: "(1) [t]hat the defendant has received a benefit from the plaintiff," and "(2) [t]hat the retention of the benefit by the defendant is inequitable."[47]

Returning to our example of the home builder, suppose that A has completed a house on B's property. The contract itself, however, was signed by C who claimed to be, but was not, an agent of B with the authority to act on B's behalf. B has certainly benefitted from A's work and labor, since there is a new house on B's property. While there may not be a binding contract between A and B, most courts would permit A nevertheless to recover the value of his services, as well as the value of any materials purchased, based upon an implied-in-law contract.[48]

In comparing implied-in-law contracts to implied-in-fact contracts, it has been said that:

> In one case the contract is mere fiction, a form imposed in order to adopt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty.[49]

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45. Hertzog v. Hertzog, 29 Pa. 465, 468 (1857).

46. Compare this difference between a contract implied in law and a contract implied in fact with constructive and implied conditions. Constructive conditions, like implied-in-law contracts, are imposed by courts for reasons of fairness, whereas implied conditions, like implied-in-fact contracts, are inferred from the intent of the parties. RESTATEMENT (SECOND) OF CONTRACTS § 226 cmt. c (1981). This interpretation also lends support to the use of the term constructive contract for contracts implied in law.

47. WOODWARD, *supra* note 40, at 9. There are some instances, however, where a court will deny a recovery, notwithstanding the presence of both of these elements, based on public policy or some other reason. *Id.* One example would be where the plaintiff conferred a benefit upon the defendant based upon an illegal contract to which both were a party. *Id.* at 212.

48. *See* KEENER, *supra* note 42, at 326.

49. *Hertzog*, 29 Pa. at 468.

Many legal scholars refer to contracts implied in law as "quasi-contracts" because of their fictional aspect.[50] Quasi- contract may in fact be the better term since it would eliminate some of the confusion associated with the term "contract implied in law."[51] Courts have also referred to them as actions *ex contractu* or constructive contracts.[52] Whatever the term, the idea remains — a contract imposed upon an enriched party requiring that party to render performance by compensating the deprived party. This distinction between implied-in-fact and implied-in-law contracts, while seemingly of academic interest only, is critical, for example, when suing the United States government. Courts have no jurisdiction over implied-in-law or "quasi-contract" claims against the federal government.[53] Much more will be said about the development of contracts implied in law, as their history is inextricably connected to the development of quantum meruit.[54]

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50. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 19, at 44 (1963); WOODWARD, *supra* note 40, at 6.

51. WOODWARD, *supra* note 40, at 6. Contracts implied in law owe their origins to Roman law and were referred to as actions quasi *ex contractu*. Sir Henry Sumner Maine in his treatise on Roman law stated:

> This word "quasi," prefixed to a term of Roman law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It does not denote that the two conceptions are the same, or that they belong to the same genus. On the contrary, it negatives the notion of an identity between them; but it points out that they are sufficiently similar for one to be classed as the sequel to the other . . . and employed without violent straining in the statement of rules which would otherwise be imperfectly expressed.

SIR HENRY SUMNER MAINE, ANCIENT LAW 333 (1878). The term contract implied in law will nonetheless be utilized throughout this work since courts of today tend to use this term more often than quasi-contract.

52. *See, e.g.*, Dunn v. Phoenix Village, Inc., 213 F.Supp. 936 (W.D. Ark. 1963):

> Quasi or constructive contracts (commonly referred to as contracts implied in law) are obligations which are imposed or created by law without regard to the assent of the party bound, "on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action ex contractu."

Id. at 951 (quoting 17 C.J.S. *Contracts* § 6). *See also* Donovan v. Kansas City, 175 S.W.2d 874 (Mo. 1943) (using "constructive contract" and "quasi-contract" interchangeably).

53. *See* Donald A. Wall & Robert Childres, *The Law of Restitution and the Federal Government*, 66 NW. U. L. REV. 587 (1971). *See also infra* text accompanying notes 276-332 (discussing government contracts).

54. *See infra* text accompanying notes 70-162 discussing the historical development of quantum meruit.

3. *Expectancy, Reliance, and Restitution*

There exist in the contemporary legal system three identifiable interests, or purposes, that can be injured when a plaintiff's attempted transaction, or contract, fails; by applying legal and equitable remedies, the courts seek to fulfill these interests. These interests are expectation, reliance, and restitution.[55] Individual facts and circumstances of each case will dictate the interest, or interests, to be protected. These individual facts and circumstances, the plaintiff's disposition over the failed transaction, the particular court's disposition over the case, and the controlling law will determine whether the plaintiff's best remedy lies in being put in a pre-performance or post-performance position.[56]

a. The expectancy interest

An expectancy interest is protected or remedied by placing the injured party in the position she would have occupied had the breaching party performed the contract (i.e., the injured party seeks a *post*-performance position).[57] This post-performance position is measured by the net gain the injured party sought to achieve by entering the failed transaction. By its own terminology, an expectancy remedy attempts to fulfill the injured party's reasonable expectations when entering the attempted transaction.[58] For example, suppose our builder, A, enters into an express contract with B to build a house for B. Before A can complete the house, B breaches. A may sue B on the express contract and seek the profit that would have been made had B not breached. In other words, A may sue for the profit she had *expected* to receive.

b. The reliance interest

A reliance interest is protected by placing the injured party in a *pre*-performance position,[59] requiring that the breaching party reimburse the injured party for money spent by the injured party in justifiable reliance on the breaching party's promise to perform. The

55. ROSETT, *supra* note 32, at 339. *See also* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 54 (1936) (discussing the interests of the plaintiff that may be injured).

56. Fuller & Perdue, *supra* note 55, at 54.

57. *Id.*

58. *Id.*

59. *Id.*

nonbreacher's justified reliance led to the detriment, and the breacher had reason to know that the nonbreacher would reasonably do so. Because the nonbreacher's detrimental reliance was reasonable,[60] we allow reimbursement for out-of-pocket expenses. Since the breacher had reason to know that the nonbreacher would spend money preparing for performance, it is said that the breacher led the nonbreacher to the detriment (i.e., the breacher caused the nonbreacher to be injured). Thus, the breacher must repay the nonbreacher for reasonable expenditures. In the house-building example, this would be the detriment suffered by the builder who relied on the homeowner's promise. Thus, if B breaches, A may sue to recover any expenses incurred in reliance on the contract. These expenses could include such things as building materials and binding commitments to pay employees or subcontractors.

c. The restitution interest

Like reliance, a restitution interest is protected by seeking to restore the injured party to the position it would have been in had it never entered into the contract.[61] The injured party seeks to be returned to a pre-performance position, as if the failed transaction had never taken place. What separates the restitution interest from the reliance interest is that restitution requires that the defendant-breacher acquire and retain some tangible benefit from the plaintiff.[62] When this happens, it is said that the defendant has been "unjustly enriched." Thus it can be said that restitution is often a subcategory of reliance in that it requires the additional element of unjust enrichment.[63]

Suppose in the example above that B, homeowner, prevents A, home builder, from completing the house. A has spent a good deal of time and money working on B's house; B has a partially built

60. Reasonableness is, of course, a factual question which must be proved to the trier of fact as a prerequisite for adjudicating the case further.

61. Fuller & Perdue, *supra* note 55, at 54.

62. Unfortunately, this clear separation of the restitution interest from the reliance interest has been muddied from the beginning by the working definition of restitution, which states that "[a] person confers a benefit if he . . . performs services beneficial to or *at the request of* the other . . . ." RESTATEMENT OF RESTITUTION § 1 cmt. b (1937) (emphasis added). *See also* Bond v. Oak Mfg. Co., 293 F.2d 752, 753 (3d Cir. 1961) (using the identical definition).

63. Fuller & Perdue, *supra* note 55, at 55. Thus, it should be apparent that restitution is the interest that courts are seeking to protect when they grant a recovery based upon a contract implied in law. Restitution, however, can also arise in numerous other situations such as torts and constructive trusts. *See* 1 PALMER, *supra* note 4, at 2-3.

house on his land born out of A's labor and materials. A is entitled to restitution because A relied on B's promise to pay *and* B was enriched (i.e., B now has A's materials and the fruits of A's labor). A justifiably relied, and B was unjustly enriched.[64] To contrast the restitution interest and the reliance interests in this example, suppose that A had only spent money in loading her trucks and cutting the wood for B's home and B breached before A ever came over to do any work — B has not been enriched. B does not have A's materials or a partially built house. Yet, since A spent money cutting the wood and loading her trucks, she has still acted to her detriment in relying on the contract. Here, A's reliance interest must be protected because, although B never received any benefit from A's actions, A still acted to her detriment in reasonably relying on B's failed performance.

The distinctions among the three legal interests are clarified even further by the assertion that the restitution interest is more entitled to protection than the reliance interest alone, and that a reliance interest is more entitled to protection than an expectancy interest.

> [T]he "restitution interest" . . . presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.
>
> On the other hand, the promisee who has actually relied on the promise, even though he may not thereby have enriched the promisor [thus only losing his reliance interest], certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for his disappointment [*i.e.*, demands satisfaction of the expectancy interest] in not getting what was promised him.[65]

Although such an assertion may be a topic for debate, the distinctions illustrated by this hierarchy help clarify the similarities and differences among the three interests.

d. Overlap among the interests

It has also been asserted that in some situations restitution and reliance are not limited merely to putting an injured party in a pre-

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64. The added element of A's justifiable reliance in this situation would likely be required in order to meet the requirement that the enrichment of B was unjust or inequitable. Had B breached the contract *before* A began any of the work, and, knowing this to be true, A went ahead and performed anyway, no recovery could be had in restitution. In this case, B's enrichment is no longer unjust.

65. Fuller & Perdue, *supra* note 55, at 56.

performance position. While restitution can serve to return out-of-pocket expenses to an injured party, it can, in its real application, give such injured party more than just his money back; it can give him something he did not have before.[66] This is an indication that the three interests, reliance, restitution, and expectation, while theoretically distinct, are in practice often overlapping.[67] For example, if the client of an accountant or a banker received advice that was the product of the professional's long hours of research and expertise, and the client refused to pay, such client would have received the benefit of free advice. The client has been unjustly enriched at the professional's expense. Restitution might measure the defendant-client's gain by the fair market value of the professional's hours of service. The fair market value of the plaintiff professional's services is not limited merely to expenditures; it includes a profit margin.[68] Reliance, too, might award this accountant or banker plaintiff the "something extra" of profit, because the advice was given after a promise to pay, which was relied upon by the accountant or banker.

The reason that the "something extra" of profit is often interjected into recovery based on restitution or reliance is that we sometimes have to go outside the transaction, into the "fair market," to determine the basis of the nonbreacher's compensation. By going outside into the realm of the fair market evaluation, we find that each bidder in this fair market has included a profit margin in her price, and when we bring this fair market price back into the transaction, we bring with it the profit.[69] The value of detrimental reli-

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66. *See id.* at 54-55 n.2; 1 PALMER, *supra* note 4, at 4; Dale A. Oesterle, *Restitution and Reform*, 79 MICH. L. REV. 336, 338 (1980).

67. The overlap between reliance and restitution has been shown. *See supra* text accompanying notes 64-65. It is possible to rely on a promise and confer a benefit. But there is a subset of restitution which is not related to reliance: It is possible to confer a benefit without the presence of a promise on which to rely (i.e., conferring a benefit without a preceding promise), such as the case of mistaken performance. There is also overlap between the expectation interest of profit and the interests of reliance and restitution. The discussion which follows shows that elements of expectation interest can also creep into an analysis of restitution or reliance.

68. Oesterle, *supra* note 66, at 345. *See also infra* text accompanying notes 184-91 (discussing fair market value in regard to recovery for the nonbreaching party).

69. It is the use of the word "profit" that is causing the confusion. Profit, in the Fuller and Perdue interest sense, is the plus margin that is expected, the raison d'etre for entering into the transaction. Fuller and Perdue, *supra* note 55, at 76. When we speak of the profit included in the use of fair market value, we are using profit to mean that amount which exceeds expenses. A builder planning to build a home might have an expectancy interest of 20% (i.e., after adding up the costs of materials and labor, a 20% figure was added to bid). This 20% was the builder's "expectancy interest." When we award the builder reliance or restitution damages, we measure the builder's loss or the homeowner's gain by the fair market value. What we are doing is taking a

ance also can be measured by an objective market value, and this value would of necessity include the profit of other available market prices. In looking to the fair market value to evaluate reliance and restitution, the fair market price should include some modicum of profit, that profit that other market participants include in their pricing.

While the rudimentary explanation and comparison of these interests are not completed by the preceding paragraphs, this short explanation presents the basic conceptual framework of each interest and demonstrates that the borderlines that separate them are not always clear and distinct.

B. Historical Development of Quantum Meruit

The first uses of the term quantum meruit are not at all clear. While the phrase is certainly Latin in origin, no reference to the term can be found in works on Roman law.[70] Its use during medieval times is especially clouded. Many legal historians imply that it existed, but they fail to adequately explain the manner in which it was used.[71] It is likely that one of the first uses of quantum meruit was in the chancery courts.[72] Its utilization in the common law courts did not occur until at least the sixteenth century.[73] Its subsequent development followed the evolution of English contract law, especially that of the action of assumpsit. As such, it is necessary to briefly review the history of contract law as it relates to the origins and development of quantum meruit.[74]

1. Medieval Contractual Actions

In the fourteenth century, prior to the development of assumpsit, the forms of action used in contractual matters were debt, detinue,

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fair market profit margin as well. This margin may or may not be coincidental with the builder's expected 20%. *See id.* at 73-76.

70. Roman law did, however, recognize quasi-contractual obligations. H.F. JOLOWICZ & BARRY NICHOLAS, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 284-85 (3d ed. 1972).

71. *See, e.g.*, A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 64 (1975).

72. JAMES B. AMES, LECTURES ON LEGAL HISTORY 156 (1913). *See also* BAKER, *supra* note 15, at 272 ("Claims were entertained in Chancery for a just reward for services where no certain sum had been fixed.").

73. SIMPSON, *supra* note 71, at 65.

74. This discussion will be limited to developments in the common law, even though equity courts also offered relief in contractual matters. *See id.* at 122.

account, and covenant.[75] Each action had its own factual and procedural prerequisites, which often enough were so complicated and restrictive as to leave the injured party effectively with no remedy.[76] The common law courts viewed what we today would consider a contractual matter as a relationship between two or more parties where items, or "grants," were exchanged.[77] The idea of the exchange of mutual promises coupled with the notion of consideration did not gain acceptance until after the development and modification of assumpsit itself.[78]

a. Debt

The "oldest and most important" contractual action in the fourteenth century was the writ of debt.[79] Debt, however, was limited to situations in which either the plaintiff could produce an instrument under seal, or had given the defendant something.[80] Debt did not concern a promise to pay the creditor; it just covered a relationship between parties. The relationship created the debt; there was no promise to pay.[81] With debt there was no question of an undertaking. The relationship sprang from the exchange of "grants," not promises.[82] Although an exchange of grants hints upon the idea of consideration in contracts today, there was no element of a promise according to the common law judges.

The pleading and proof of debt were very difficult. The action required that a "sum certain" allegedly owed by the defendant to the plaintiff be pleaded and proven.[83] Debt did not exist unless the exact amount was known and shown. In addition, the action of debt could be defended by wager of law[84] and could not be maintained

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75. AMES, *supra* note 72, at 122.

76. *Id.*

77. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 633 (5th ed. 1956).

78. AMES, *supra* note 72, at 122.

79. PLUCKNETT, *supra* note 77, at 633.

80. BAKER, *supra* note 15, at 268-69. In the latter situation, "[a] plaintiff could maintain an action of debt if he had conferred some valuable recompense, or *quid pro quo*, upon the defendant in return for the duty [to pay the debt] . . . ." *Id.* at 268.

81. PLUCKNETT, *supra* note 77, at 363.

82. *Id.* The "grant" that the debtor gave to the creditor was the debt itself. SIMPSON, *supra* note 71, at 80.

83. SIMPSON, *supra* note 71, at 61.

84. A party defending a debt action by wager of law "would take an oath in open court that he did not owe the debt, and at the same time bring with him eleven neighbors (called 'compurgators'), who should avow upon their oaths that they believed in their consciences that he said the

against the survivors of the defendant.[85]

While legal historians seem to agree that quantum meruit had no place in the action of debt due to the requirement of a sum certain,[86] in some situations this may not have been entirely true. Simpson states that "so long as the price could be fixed somehow, it did not have to be fixed by agreement, and in medieval times many prices were fixed by law independently of agreement; in such cases the plaintiff could demand the sum due at law."[87] While this is not technically quantum meruit, it is certainly a related concept. Simpson also states that the plaintiff could sometimes get away with pleading a sum certain where none had actually been agreed upon.[88] Finally, as the law of assumpsit evolved in the early seventeenth century, quantum meruit claims were occasionally allowed in debt actions where the plaintiff claimed an agreement "to pay a reasonable sum," and then requested a specific amount.[89]

b. Covenant

The action of covenant existed at the same time as debt, and was brought to enforce agreements.[90] By way of this action, the plaintiff could be compensated for the defendant's nonfeasance, or nonperformance, of his covenant.[91] While covenants may have been closer to what we view as contracts today, the action became less significant once the Royal Courts began to require an instrument under seal.[92] In addition, subsequent developments in the law of assumpsit and the use of conditioned bonds made covenant actions rare.[93]

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truth." BLACK'S LAW DICTIONARY 1579 (6th ed. 1990).

85. 2 THOMAS A. STREET, FOUNDATIONS IN LEGAL LIABILITY 61 (1906).

86. *See, e.g.*, SIMPSON, *supra* note 71, at 64; AMES, *supra* note 72, at 89.

87. SIMPSON, *supra* note 71, at 65. A "common labourer's" wages, for example, were set by law. *Id.*

88. *Id.*

89. *Id.* at 66. As Simpson states, it is not certain whether all courts would permit such pleading. The availability of implied-in-fact and implied-in-law contracts obviates the need for such false pleading. This could, however, be roughly analogous to a present-day quantum meruit claim on an express contract. While unusual, it is certainly possible that two parties would expressly agree that compensation be measured by the amount deserved by the party performing the services.

90. BAKER, *supra* note 15, at 264-65.

91. *Id.* at 266. An action in covenant could not be maintained, however, for an improper performance (misfeasance).

92. PLUCKNETT, *supra* note 77, at 633-34. This occurred around the beginning of the fourteenth century. BAKER, *supra* note 15, at 265.

93. SIMPSON, *supra* note 71, at 43. A conditioned bond required a party to pay a sum of money to another unless the former performed as required in the bond. In this manner, a failure to

c. Account and detinue

The remaining contractual-type actions of account and detinue were of less significance in the development of contract law than were debt and covenant. An action in account generally was applicable to only a few types of relationships, such as partners,[94] and required the defendant to render "a reasonable account to the plaintiff of money received."[95] Account, however, did play a role in the development of quasi-contracts, or contracts implied in law.[96] Detinue, on the other hand, was the "twin sister" of debt, and was an action to recover specific personal property.[97]

2. The Development of Assumpsit

a. Trespass and trespass on the case

At the beginning of the thirteenth century, there also existed a system of writs for remedying wrongs known as trespass actions.[98] A writ of trespass "summoned the defendant to come and explain why he had done wrong"[99] and in this sense was equivalent to present day tort actions. Initially the Royal Courts required that the wrong be done "with force and arms, and against the peace of the lord King."[100] In addition, these general trespass actions were fit into certain common forms such as assault or the taking of property. The general formulas soon became insufficient, however, and plaintiffs were permitted to set forth the unique factual circumstances which they felt entitled them to relief.[101] Actions styled in this manner were termed "trespass on the case," and offered a flexible alternative to the rigid formulas of general trespass.[102]

In order to further distinguish general trespass actions from trespass on the case, it has been said that in the former the defendant is

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perform as promised was actionable in debt. *Id.* at 43-44.

94. PLUCKNETT, *supra* note 77, at 635.

95. BAKER, *supra* note 15, at 301.

96. *Id.* at 300.

97. *Id.* at 267.

98. *Id.* at 56.

99. *Id.*

100. SIMPSON, *supra* note 71, at 202 (translated from the Latin phrase *vi et armis, et contra pacem Domini Regis*). This requirement was eventually dropped in the late fourteenth century. *Id.*

101. BAKER, *supra* note 15, at 58. There was also no requirement in these actions that the defendant had acted with force and arms. SIMPSON, *supra* note 71, at 202-03.

102. BAKER, *supra* note 15, at 58.

punished for doing what he "ought not to have done," while in actions on the case the defendant "had *not* done what [he] ought to have done."[103] Thus, actions for trespass on the case were the rough equivalent of what is now termed a "breach of duty."[104] Because of this distinction, the medieval courts required that there be some reason why the defendant should have done something (i.e., a duty), else liability would not attach. At first, a duty was based upon either law and custom or a previous transaction between the parties.[105] Eventually this source of duty evolved into "assumpsit," which meant that the defendant undertook "to do something, and then did it badly to the damage of the plaintiff."[106]

A case illustrating this early notion of tort was *The Case of the Humber Ferryman.*[107] The plaintiff alleged that the defendant, a ferryman, had undertaken to move his horse across a river, but had overloaded the ferry so much that it overturned and drowned the plaintiff's horse. Procedurally, the case was a bill of general trespass, but the plaintiff alleged that the ferryman had assumed the liability for damage.[108] In another case, in 1369, a plaintiff alleged that the defendant had assumed to cure his sick horse but was so negligent in his treatment that the horse died.[109] The destruction of the plaintiff's chattel (horse) was the basis for the trespass, and the defendant's undertaking to cure the horse was the necessary assumpsit element of the trespass.[110]

The idea of trespass above involved a "misfeasance" to the plaintiff.[111] The misfeasance was the damage done to the chattels. In the case of nonfeasance, however, the common law courts were very reluctant to permit trespass actions.[112] Since the situation "sounded in

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103. SIMPSON, *supra* note 71, at 204.

104. *Id.*

105. *Id.* at 205-07.

106. BAKER, *supra* note 15, at 274.

107. Bukton v. Townsend, Y.B. 22 Lib. Ass., fo. 94, pl. 41 (K.B. 1348).

108. PLUCKNETT, *supra* note 77, at 470-71. While the record nowhere contains the term *assumpsit* and was regarded as a general trespass, the action is generally thought to be an early example of assumpsit for trespass on the case. One possible reason for the omission of the term assumpsit was that the ferryman was engaged in a common calling and therefore it was not necessary to plead and prove an actual assumpsit (duty was based upon law and custom). *See supra* text accompanying note 105.

109. Waldon v. Marshall, Y.B. 43 Edw. 3, fo. 33, pl. 38 (1369).

110. PLUCKNETT, *supra* note 77, at 638 (referring to a partial translation of a report in Waldon v. Marshall, Y.B. 43 Edw. 3, fo. 33, pl. 38 (1369)).

111. *Id.*

112. *Id.* at 639.

covenant," a trespass action could not be maintained, and the plaintiff who detrimentally relied on a defendant's future undertaking was usually without remedy.[113] While the distinction seems harsh, especially in light of the problems associated with actions in covenant, it nonetheless remained until at least the fifteenth century.[114]

b. Simple assumpsit

At a time when the common law courts were seeking to gain jurisdictional power, there was a strong incentive to extend the action similar to the trespass-assumpsit to those cases of nonfeasance.[115] Such an extension was first accomplished by finding another basis besides nonfeasance alone for the defendant to be held liable.[116] As stated previously, courts did not hesitate to impose a duty upon many of the common callings, such as innkeepers. Thus, the courts also did not find it difficult to allow actions in assumpsit where a member of one of these trades had failed to act as was required (nonfeasance).[117]

The principal method by which assumpsit was expanded to include nonfeasance, however, was the use of deceit. The courts initially permitted trespass on the case to be brought on the express warranties of merchants. If the goods did not conform to the quality levels expressed by the seller, the seller was seen as having deceived the buyer.[118] Eventually this was extended to the point where failure to act upon an assumed undertaking constituted a deceit and was thus actionable in assumpsit.[119] One requirement that was imposed on these actions, however, was that of consideration. In order for the nonfeasance to become actionable, something more had to be present. That is, the plaintiff must have either given the defendant something in return for the promise, or detrimentally relied on the defendant's promise.[120] "Simple assumpsit" thus became an action

113. BAKER, *supra* note 15, at 275.

114. *Id.* at 276-77.

115. PLUCKNETT, *supra* note 77, at 639.

116. BAKER, *supra* note 15, at 277.

117. *Id.* at 277-78. An example would be where an innkeeper refused to give lodging to someone.

118. PLUCKNETT, *supra* note 77, at 640-41.

119. *Id.* at 641-43; BAKER, *supra* note 15, at 278-89.

120. BAKER, *supra* note 15, at 280-81. "Assumpsit would lie only upon a promise given for sufficient consideration. . . . The plaintiff alleged that in consideration of something done by him for the defendant the defendant promised to do something else, and that the defendant deceitfully failed to keep his promise." *Id.* at 281.

for the nonperformance of a parol or simple contract.[121] The notion supporting the action was still deceit and remained so until the beginning of the seventeenth century, but the basics of modern contract law had begun to emerge.

3. The Emergence of Indebitatus Assumpsit and the Common Counts

a. Application of assumpsit to a debt: Indebitatus assumpsit

Simple assumpsit was not available to recover a debt even when the debt arose out of a specific promise to pay.[122] As stated previously, debt only concerned a relationship between the parties.[123] A debtor could actually be in debt to someone yet never have made a promise to pay that debt. Assumpsit was only available for the nonperformance on a simple contract.[124] If there was no promise to pay the debt, there was no assumpsit. In still another attempt to expand their jurisdiction, the common law courts began to develop a specific type of assumpsit: indebitatus assumpsit.[125]

After it was settled that assumpsit would lie for nonfeasance, the courts also began to recognize that assumpsit could be used to enforce a debt if the defendant had made a promise to pay such debt at the same time or after such debt was created.[126] Such an action became known as indebitatus assumpsit and originated early in the sixteenth century.[127] The existence of the contemporaneous or subsequent-to-debt promise was an absolute prerequisite to pleading indebitatus assumpsit.[128] In 1532, it was also held that the plaintiff could elect to bring an action in either indebitatus assumpsit or debt.[129] While many objected to this new remedy, indebitatus assumpsit became a very common action.[130]

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121. RESTATEMENT OF RESTITUTION pt. I, introductory note, at 15 (1937). Modern textbooks refer to this earliest type of assumpsit as "simple" or "special assumpsit." "General assumpsit," also known as "implied assumpsit," is the type of assumpsit that existed after the expansion of indebitatus assumpsit in *Slade's Case*. *See infra* text accompanying notes 134-40.

122. 1 PALMER, *supra* note 4, at 6.

123. *See supra* text accompanying notes 79-89.

124. 1 PALMER, *supra* note 4, at 6.

125. BAKER, *supra* note 15, at 287.

126. *Id.* at 282-83.

127. *Id.*

128. AMES, *supra* note 72, at 92.

129. *See* SIMPSON, *supra* note 71, at 628-29 (citing Pickering v. Thoroughgood, B.M. MS. Hargrave 388 (1533)).

130. BAKER, *supra* note 15, at 288.

Toward the end of the sixteenth century, indebitatus assumpsit was used by some common law courts to enforce a debt, even where there was no subsequent promise to pay.[131] Most cases decided this way were reversed by the upper courts until 1602 because they feared that allowing indebitatus assumpsit to be used in this manner would negate the whole necessity for the action of debt.[132] But the desire of the common law courts to expand their jurisdiction won out in *Slade's Case*[133] in 1602.

b. *Slade's Case*

Slade's Case allowed indebitatus assumpsit to be used to enforce a debt without proof of a subsequent promise to pay.[134] The assumpsit itself was presumed: "Every contract executory impacts in itself an assumpsit, for when one agrees to pay money or to deliver anything, thereby he assumes or promises to pay or deliver it."[135] Thus, wherever there was a debt, as defined by the action of debt, a promise to pay that debt would be implied. That promise could be enforced by the action of assumpsit even though the actual promise was a fiction.[136] Since it was considerably easier to plead and prove, and still produced the same result as debt, indebitatus assumpsit soon came to supersede debt. Indebitatus assumpsit could be maintained against the survivors of the defendant, was not subject to wager at law, and the exact amount in question need not have been known.[137] After the holding in *Slade's Case,* the deceit basis of indebitatus assumpsit began to fade and was replaced by the contractual element — the "mutual executory agreement of both parties."[138] As one author has stated, "1602 may be regarded as the date whence the modern law of contract traces its life as a single entity."[139]

Even after *Slade's Case,* some minor problems still existed. Al-

131. 2 STREET, *supra* note 85, at 61-62.

132. *Id.* at 287.

133. 76 Eng. Rep. 1072 (K.B. 1602).

134. *Id.* The decision in *Slade's Case* was unique in that a special Exchequer Chamber consisting of all of the judges of England decided the case. While justice may indeed be slow today, the Exchequer Chamber took over *five* years to resolve the dispute. BAKER, *supra* note 15, at 286.

135. *See* PLUCKNETT, *supra* note 77, at 646 (citing Slade's Case, 76 Eng. Rep. 1072 (K.B. 1602)).

136. 2 STREET, *supra* note 85, at 64-66.

137. PLUCKNETT, *supra* note 77, at 647-48.

138. *Id.* at 648.

139. BAKER, *supra* note 15, at 287.

though the promise to pay a debt could be implied, the actual debt had to be proven in order to maintain an action of indebitatus assumpsit.[140] It is at this point that quantum meruit began to emerge.

c. The emergence of quantum meruit and the common counts: General assumpsit

As stated previously, it was difficult, if not impossible, to base an action in debt upon quantum meruit.[141] At first, this same problem existed for indebitatus assumpsit, since the action was based upon a debt. Around the time of *Slade's Case,* courts began to allow quantum meruit counts to be brought in simple assumpsit. These cases allowed the undertaking, or promise, to be assumed from the circumstances of the case.[142] This development initially occurred in the trades of common calling. The quasi-public servant nature of the trades was an excellent germination ground for novel concepts of contract. Since the law often imposed certain obligations on these tradesmen,[143] some courts began to feel that the law should also impose upon their customers a promise to pay for the goods or services that were provided to them.[144] In 1609, an innkeeper was allowed to imply a promise of a guest to pay what was reasonable for the services and goods supplied.[145] Numerous other cases soon followed, and the notion of an implied-in-fact contract was firmly established.[146] A request for services without any agreement as to what the compensation would be gave rise to a quantum meruit claim in assumpsit.

While the above mentioned development of implied-in-fact con-

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140. *Id.*

141. *See supra* text accompanying notes 79-89.

142. BAKER, *supra* note 15, at 305.

143. *See supra* text accompanying note 116-17.

144. AMES, *supra* note 72, at 154.

145. Warbrook v. Griffin, 123 Eng. Rep. 927 (C.P. 1609). "[I]t is an implied promise of every part, that is, of the part of the inn-keeper, and he shall preserve the goods of his guest, and of the part of the guest, that he will pay all duties and charges, which he caused in the house . . . ." *Id.* at 928. Ames states that this was the first recognition of a quantum meruit claim, however this has not been satisfactorily shown. *See* AMES, *supra* note 72, at 154.

146. AMES, *supra* note 72, at 156. Many authors see this as one of the starting points for quasi-contracts, that is contracts implied in law, and this is undoubtedly true. However, they fail to point out that these are really contracts implied in fact. The presence of a consensual transaction gives rise to an implied-in-fact contract. *See supra* text accompanying notes 38-39. Indeed, it is difficult to determine exactly when the courts crossed over the line from implied-in-fact to implied-in-law contracts, and this probably played a role in the resulting confusion that still exists today.

tracts was occurring, it came to pass that pleading in indebitatus assumpsit required only that the plaintiff "allege the general nature of the indebtedness . . . and that defendant being so indebted promised to pay."[147] This mode of pleading was the origin of the common counts.[148] "Work and labor done at defendant's request" is an early form of quantum meruit, and the form of pleading is essentially the same.[149] By the latter part of the seventeenth century the courts began to allow claims to be brought in indebitatus assumpsit for implied-in-fact contracts by relaxing the required proof of the debt, and indebitatus assumpsit could be used for quantum meruit claims.[150] This form of assumpsit has been referred to as general assumpsit so as to distinguish it from earlier forms of assumpsit.[151] At this point the development of quantum meruit was complete, at least as far as express and implied-in-fact contracts were concerned. The only remaining step was the development of contracts implied in law.

4. *The Origins of Contracts Implied in Law*

Regardless of the terminology, the action of general assumpsit arose and expanded along with the notion of quasi-contract.[152] The equitable nature of the new common law *legal* actions, such as general assumpsit and all its tributaries such as indebitatus assumpsit and quantum meruit, reflected the common law courts' efforts to move into the Chancellor's equitable territory.[153] Over the next few centuries, a detailed system developed of awarding restitution in

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147. AMES, *supra* note 72, at 153-54. The allegations could be, for example, "for goods sold, money lent, money paid at the defendant's request, money had and received to the plaintiff's use, work and labor at the defendant's request, or upon an account stated." *Id.* at 154.

148. *Id.* at 153. The common counts were certain standard forms of pleading in assumpsit. They included claims "for 'money had and received'; 'money paid for the benefit of the defendant'; 'goods sold and delivered'; 'land occupied and used'; 'work and labor performed (Quantum Meruit)'; and the 'value of the product (Quantum Valebant).'" JOHN F. O'CONNELL, REMEDIES IN A NUTSHELL 76 (2d ed. 1985). Today, quantum valebant is often considered to be a form of quantum meruit.

149. 2 STREET, *supra* note 85, at 185-86.

150. SIMPSON, *supra* note 71, at 499. Presumably, a similar action could be brought on an express contract.

151. RESTATEMENT OF RESTITUTION pt. I, introductory note, at 15 (1937); 1 PALMER, *supra* note 4, at 7. The terms general assumpsit and indebitatus assumpsit are somewhat synonymous. Although modern use of the terms has indebitatus as only a type of general assumpsit, indebitatus assumpsit was the most commonly used form of general assumpsit, and it is often used in place of general assumpsit to describe those post-*Slade* fictitious promise assumpsits.

152. JOHN P. DAWSON & GEORGE E. PALMER, CASES ON RESTITUTION 4 (2d ed. 1969).

153. *Id.*

cases where neither tort nor contract necessarily existed.[154]

While a detailed discussion of those cases in which the courts essentially allowed recovery on a contract implied in law will not be attempted, it is fairly clear that the first forays into implied-in-law contracts occurred in the common count for money had and received.[155] Many such actions could be maintained in account, and debt was a concurrent remedy if the plaintiff could establish a sum certain.[156] Following the result in *Slade's Case,* some courts allowed indebitatus assumpsit actions to be brought in these cases because of an implied promise to pay the debt. Thus in 1657, a recovery in indebitatus assumpsit was permitted where the plaintiff had mistakenly paid a certain sum of money to the defendant.[157] From this humble beginning, general assumpsit was permitted in numerous situations that can be characterized as contracts implied in law.[158] The problem was that these cases were hopelessly confused with actions that we would today consider to be contracts implied in fact, which caused some judges to disagree with the notion that indebitatus assumpsit would lie where there was no consensual transaction.[159]

Lord Mansfield, the great eighteenth-century jurist who invented "holder in due course,"[160] is generally seen as the savior of contracts implied in law. He explained these new developments in terms of their restitutionary nature and found a basis for implied-in-law contracts in Roman law: "If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu,' as the Roman law expresses it)."[161]

The gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

With this broadening of the scope of assumpsit came a blurring of the remedies and forms of pleading. The old forms of pleading (i.e.,

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154. DAN B. DOBBS, HANDBOOK OF THE LAW OF REMEDIES 235 (1973).

155. BAKER, *supra* note 15, at 307-12.

156. AMES, *supra* note 72, at 163. "If, for example, the money was to be applied in payment of a debt erroneously supposed to be due from the plaintiff to the defendant . . . the plaintiff would recover the money in account." *Id.*

157. Bonnel v. Foulke, 82 Eng. Rep. 1224 (K.B. 1657).

158. 1 PALMER, *supra* note 4, at 7.

159. SIMPSON, *supra* note 71, at 505.

160. *See* Miller v. Race, 97 Eng. Rep. 398, 401-02 (K.B. 1758).

161. Moses v. MacFerlan, 97 Eng. Rep. 676 (K.B. 1760).

the common counts) were essentially available in all types of actions in assumpsit. Thus, quantum meruit, one of the six common counts, applied to any indebtedness for work performed, whether based on express, implied-in-fact, or implied-in-law contracts. Lord Mansfield was probably well ahead of his time, at least in England. While the actions such as indebitatus assumpsit, debt, and account were abolished in England in 1852 for a much simpler method of pleading, contracts implied in law were disfavored in England well into the twentieth century.[162] The situation was different, however, in the United States, and contracts implied in law developed along with the law of restitution.

While this brief history of quantum meruit is by no means complete, the foregoing should impress upon the reader the confusion that has persisted for over four hundred years. Some of the terminology and principles are still basically the same today as they were at the end of the seventeenth century in England. Regrettably, so is some of the confusion.

The following chart approximates some of the major dates:

1200	1300	1350	1430	1520
Trespass Detinue Trespass on the case	Debt Assumpsit Account & Covenant	Assumpsit for Misfeasance	Indebitatus for Nonfeasance (common callings)	Assumpsit

1602	1609	1675
Slades's Case Indebitatus Assumpsit for Simple Debt	Quantum Meruit for Simple Assumpsit (common callings) Contracts Implied in Fact	General Assumpsit & the Common Counts
	1657	1760
	Indebitatus Assumpsit for Implied Promise (implied-in-law contracts)	*Moses v. MacFerlan* Explanation of Implied-in-Law Contracts

162. 1 PALMER, *supra* note 4, at 8.

C. *Quantum Meruit As It Has Evolved Into the Twentieth Century*

As stated previously, the term quantum meruit literally means "as much as is deserved" and is utilized to secure compensation for work and labor performed.[163] Recoveries in quantum meruit generally occur in three situations: implied-in-fact contracts, implied-in-law contracts, and as an alternative contract remedy upon a breach or repudiation of an express contract.[164] While the terminology may be the same, the rules regarding each situation are not. As such, a determination of what the proper recovery should be in a particular case will often hinge upon the categorization of the claim.

1. Express and Implied-in-Fact Contracts

The original application of quantum meruit was in the sphere of express and implied-in-fact contracts.[165] As previously discussed, an express contract is based upon a written or oral agreement, and an implied-in-fact contract is inferred from the conduct of the parties.[166] Any express or implied-in-fact contract involving services usually requires that one party has requested some performance by the other party,[167] and an action in quantum meruit will only lie when both parties agreed (express contract) or expected (implied-in-fact contract) that the performing party would be paid the reasonable value, as opposed to a specified rate, of the services rendered.[168] Thus, if either party reasonably believed that the work was being performed gratuitously or because of some duty to do so, without any expectation of compensation, there can be no quantum recovery on an express or implied-in-fact contract since no contract has been

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163. BLACK'S LAW DICTIONARY 1243 (6th ed. 1990). Some courts also apply the term to claims for the value of goods, which is technically quantum valebant. The two modes of recovery, however, generally follow the same principles.

164. ROSETT, *supra* note 32, at 340-41.

165. Candace S. Kovacik, *A Proposal to Simplify Quantum Meruit Litigation*, 35 AM. U. L. REV. 547, 554 (1986). *See also supra* text accompanying notes 141-51 (discussing the history of quantum meruit).

166. *See supra* text accompanying notes 38-39.

167. Kovacik, *supra* note 165, at 555. It is also possible to have an implied-in-fact contract where one party accepts the performance of the other, without having requested the work, and the party accepting knows that the other will demand payment.

168. *Id.* at 556. As was stated in the historical section, a recovery in quantum meruit on an express contract is rare. It is more often the case that one party has merely requested the services of the other, having never discussed any specific price for the work, and has the expectation that the ultimate "bill" would be for some reasonable sum.

formed.

The amount of a quantum meruit recovery on an express or implied-in-fact contract is generally measured by the fair market value of the work performed, since this is considered to be the reasonable value of the services.[169] Both parties are *assumed* to have agreed that this would be the reasonable value of the one party's performance,[170] although they certainly may differ as to what the fair market value actually is. In this regard, a recovery in quantum meruit on an express or implied-in-fact contract is *not* restitutionary, rather it is compensatory. That is, the court attempts to compensate the plaintiff for the damages he has suffered from the defendant's failure to perform. Thus, the recovery protects either the plaintiff's expectancy or reliance interests.[171]

2. *Implied-in-Law Contracts*

The second area in which recoveries in quantum meruit arise is that of implied-in-law contracts, or quasi-contracts. While the terminology may cause some confusion, an action on an implied-in-law contract is a purely *restitutionary* claim.[172] An obligation arises "without reference to the assent of the obligor, from the receipt of a benefit the retention of which is unjust, and requiring the obligor to make restitution."[173]

An implied-in-law contract can arise in numerous situations in which a quantum meruit recovery may be appropriate. For example, services may be performed under the mistaken belief that one had a duty to do so, or they might be rendered pursuant to a contract later found to be invalid (e.g., because an agent's authority to bind the principal was lacking).[174] While the variety of situations is endless, the essential element remains the same — one party has been unjustly enriched at the expense of another.

Recovery in quantum meruit on an implied-in-law contract is measured by the amount the party to be charged has benefitted.[175]

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169. *See* ROSETT, *supra* note 32, at 340; Kovacik, *supra* note 165, at 556.

170. Kovacik, *supra* note 165, at 556.

171. *See supra* text accompanying notes 55-69 (discussing the three interests courts seek to protect: expectancy, reliance, and restitution).

172. ROSETT, *supra* note 32, at 341.

173. WOODWARD, *supra* note 40, at 4.

174. *Id.*

175. *Id.* at 5. ("[T]he obligee shall be compensated, not for any loss or damage suffered by him, but for the benefit which he has conferred upon the obligor.").

The focus is not on the performing party but rather is on the person receiving the benefit of the services and what the receiving party has actually gained. While this differs from the recovery under an express or implied-in-fact contract, under some circumstances the result obtained is the same. If the receiving party actually requested that the services be performed, the benefit he has gained can be appropriately measured by the fair market value of the services.[176] "[T]he defendant has received something desired by him, and the question whether he is thereby enriched in estate is irrelevant."[177] In this regard, use of the word "benefit" is more appropriate than "enrichment,"[178] although "unjust enrichment" seems to be the commonly used phrase in restitution. In most other situations, however, the proper remedy is the amount of the defendant's enrichment (i.e., economic gain), as difficult a determination as that may be.

3. *Quantum Meruit as an Alternative Contract Remedy*

The final application of quantum meruit is as an alternative contract remedy. Upon the repudiation or breach of a contract (express or implied-in-fact), both the nonbreaching as well as the breaching party may recover in quantum meruit.[179] While many authors make a solid distinction between the two situations, it probably makes more sense to consider them together under their own separate headings.[180]

a. Recovery by a nonbreaching party

When a valid, enforceable contract has been repudiated or breached, the nonbreacher may elect to recover in restitution as opposed to recovering actual damages.[181] This result arose from the courts "pretending that every contract included a fictional promise

176. *Id.* at 9; Kovacik, *supra* note 165, at 557.

177. WOODWARD, *supra* note 40, at 9. *See also infra* text accompanying notes 186-91 (discussing the RESTATEMENT (SECOND) OF CONTRACTS § 371 (1981) as its provisions are also pertinent to this question).

178. WOODWARD, *supra* note 40, at 9.

179. ROSETT, *supra* note 32, at 341.

180. Woodward, for example, treats a recovery by the breacher as purely quasi-contractual. However, he feels that a recovery by the nonbreacher is not. WOODWARD, *supra* note 40, at 264-65, 410-11. While this may be a topic for debate, whether or not the latter situation is an implied-in-law contract is not of great importance to the present discussion.

181. See Petropoulos v. Lubienski, 152 A.2d 801 (Md. 1959) for an example of such an election. In a suit for actual damages, a suit "on the contract," the nonbreacher seeks to protect his expectancy or reliance interest. *See supra* text accompanying notes 55-69.

that if the contract were breached, the breacher would pay the value of any performance rendered by the nonbreacher."[182] In this regard, the nonbreacher "may elect to *disregard* his contract . . . and demand restitution in value for what he has done."[183]

The nonbreaching party who has rendered a past performance is able to elect a remedy; the election is between a suit on the contract or a suit in quantum meruit. Naturally, nonbreaching parties will elect quantum meruit only when it results in a greater recovery than a suit on the contract. In other words, quantum meruit will be elected when the deal struck is a losing deal for the nonbreaching party.

A quantum meruit recovery elected by a nonbreacher will usually be the reasonable (fair market) value of the services performed under the contract.[184] In this sense, the fair market value means the price that the breaching party would have had to pay someone else to do the same work.[185] *The Restatement (Second) of Contracts,* however, merely provides that the recovery can be *either* the fair market value of the services[186] or the amount by which the breacher's property has been enriched ("or his other's interests advanced").[187] As has been stated, the nonbreaching party would elect the quantum meruit recovery only when it results in a greater recovery than a suit on the contract. Quantum meruit will be elected when the deal struck is a losing one for the nonbreaching party, that is, where the recovery of the expectation damage of profit is not feasible. While no indication is given in the *Restatement* as to how the court should make the choice between the two measurements of quantum meruit recovery, the comments to section 371 indicate that the breacher should disgorge the benefit of receiving something that he desired.[188] In addition, although the price specified in the con-

182. ROSETT, *supra* note 32, at 341.

183. WOODWARD, *supra* note 40, at 411.

184. Kovacik, *supra* note 165, at 564; RESTATEMENT (SECOND) OF CONTRACTS § 371 cmt. b, illus. 1 (1981).

185. RESTATEMENT (SECOND) OF CONTRACTS § 371(a) (1981).

186. *Id.* § 371(a).

187. *Id.* § 371(b).

188. *Id.* § 371 cmts. a & b. Comment b states that the non-breacher should usually be able to recover the *greater* of the two measurements; however, the fair market value of the services will almost always be at least equivalent to, if not greater than, the amount the breacher has been enriched. In any event, the fair market value of the services is usually the proper measure of recovery except in unique circumstances. One commentator states that under English law the fair market value is normally the device used to determine quantum meruit recoveries. The exception would be "that where services are of such a nature that their remuneration would usually depend

tract may serve as a guide in determining the reasonable value of the services rendered, it generally acts as no limit on the nonbreacher's recovery.[189] To hold otherwise would place a breacher in a better position than she would have been in had she fully performed under the contract. An important limitation, however, is that a recovery in quantum meruit (or restitution) will not be permitted when the nonbreacher has "fully performed" her contractual duties.[190] The contract price is considered a liquidated debt, and the nonbreacher may not claim that her services were worth more than what she originally agreed to.[191]

b. Recovery by a breaching party

A breaching party may also have a remedy in quantum meruit against a nonbreacher. If the nonbreacher has retained some benefit from the breacher's partial performance (e.g., a partially completed home), the breaching party may recover in quantum meruit the value conferred on the nonbreacher minus any damages incurred by the nonbreacher because of the breach.[192] The measurement of the value conferred upon the nonbreacher will almost always be the actual benefit retained by the nonbreacher, since the party seeking the recovery is at fault.[193] A further limitation on the breaching party's recovery is that she will not "be allowed to recover more than a ratable portion of the total contract price where such a portion can be determined."[194] Thus, a breaching party is not permitted to recover more than she could have had she fully performed. Finally, the breach must not have been a willful one in the majority of jurisdictions.[195]

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on the result achieved, remuneration on a *quantum meruit* claim may take into account the degree of benefit conferred on the defendant." MUNKMAN, *supra* note 2, at 97.

189. WOODWARD, *supra* note 40, at 430. Keep in mind that in many circumstances the fair market value of particular work may be difficult to measure. For example, if the breacher has a house that is half-completed, measurement of the fair market value of the nonbreacher's services may be difficult without resorting to some pro-rated portion of the total contract price (assuming, of course, that the original contract price was comparable to what other builders charge). Also, a nonbreaching party still has a right to recover compensatory damages, and in this example a reliance or expectancy interest may provide a greater recovery.

190. RESTATEMENT (SECOND) OF CONTRACTS § 373(2) (1981). Some commentators have disagreed with the logic behind this, and the rule is not a part of English law. *See* Heyman v. Darwins, A.C. 356 (1942).

191. Oliver v. Campbell, 273 P.2d 15 (Cal. 1955).

192. RESTATEMENT (SECOND) OF CONTRACTS § 374 (1981); Britton v. Turner, 6 N.H. 481 (1834).

193. RESTATEMENT (SECOND) OF CONTRACTS § 374 cmt. b (1981).

194. *Id.*

195. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 477 (3d ed. 1987).

II. DIVERGENCES FROM THE NORM: UNIQUE APPLICATIONS OF QUANTUM MERUIT

While the previous discussion is an accurate description of how most courts should and do deal with quantum meruit claims, there are times when these rules do not hold true. It must be remembered that quantum meruit can often be seen as a *legal* form of equitable restitution, and as such, certain notions of fairness often enter the picture. Numerous situations may occur where public policy or simply the equities of the case play a significant role in the court's decision. Caution must be maintained, however, when reviewing a particular court's ruling, since many times a divergence from the norm has more to do with the court's misunderstanding of the principles rather than public policy or fairness.

A. Physicians' Recovery of Fees from Patients

One area in which a consistent body of distinct rules has developed is physicians' recoveries in quantum meruit. Under English common law physicians were not permitted to bring suit to recover their fees.[196] This rule was rejected early on in the United States;[197] however, a modified form of recovery has emerged.

Rarely does a patient enter into an express contract with his or her doctor. Usually an implied-in-fact contract will exist based upon the patient's request for the physician's services and the physician's acceptance of the patient.[198] Fees are usually not discussed, and the

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196. Chorley v. Bolcot, 100 Eng. Rep. 1040 (K.B. 1791). "[T]he fees of a physician are honorary, and not demandable of right; and it is much more for the credit and rank of that honourable body, and perhaps for their benefit also, that they should be so considered." *Id.* at 1041.

197. Pynchon v. Brewster, Quincy 224 (Mass. 1766); Judah v. M'Namee, 3 Blackf. 269 (Ind. 1833).

198. Spencer v. West, 126 So. 2d 423, 426 (La. Ct. App. 1960).

> An action to recover for medical services rendered is, of course, predicated upon the obligation of the patient to pay and arises ex contractu. The relationship between the physician and patient may result from an express or implied contract, either general or special, and the rights and liabilities of the parties thereto are governed by the general law of contract. Where the terms of the contract, especially as to consideration, have not been predetermined, an agreement therefor will be implied and the doctor is entitled to recover for his services in the same manner as any other person who performs services for another.

Id. See also Osborne v. Frazor, 425 S.W.2d 768 (Tenn. App. 1968); Garrey v. Stadler, 30 N.W. 787 (Wis. 1886).

patient assumes that the bill will be reasonable in relation to the services provided. The normal quantum meruit recovery on an implied-in-fact contract is the fair market value of the services provided,[199] which in this case would simply be what similar physicians in the same geographical area charge for the like services.[200] Courts, however, will usually consider other factors in determining what a reasonable fee might be,[201] and they may even take the patient's ability to pay into account.[202]

With regard to contracts implied in law, a more significant difference exists for physicians recovering fees. Suppose, for example, that an unconscious accident victim is taken to the local hospital where surgery is performed. It would be impossible for an express or implied-in-fact contract to exist since the victim is unable to give any manifestation of assent. However, the principles of contracts implied in law more than adequately cover such a situation, and the victim will be required to pay for the services.[203]

It should be obvious that a slightly different approach must be taken for quantum meruit recoveries on these implied-in-law contracts. Under the previously outlined rules regarding quantum meruit, the patient would only be liable for the actual enrichment received. But how can this be adequately measured? If the surgeon

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199. *See supra* text accompanying notes 184-87.

200. 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 388 (1981).

201. *Spencer*, 126 So. 2d at 426. These factors include: "custom, the nature of the case, the amount of attention given, professional standing and skill, the end result obtained, the financial condition of the patient, and anything else which tends to increase the burden of the services performed by the physician." *Id.*

202. *In re* McKeehan's Estate, 57 A.2d 907, 909 (Pa. 1948). *But see* Cotnam v. Wisdom, 104 S.W. 164, 166 (Ark. 1907) ("[T]he financial condition of a patient cannot be considered where there is no contract and recovery is sustained on a legal fiction which raises a contract in order to afford a remedy which the justice of the case requires.").

203. *See Cotnam*, 104 S.W. at 165; Nursing Care Servs., Inc. v. Dobos, 380 So. 2d 516, 518 (Fla. Dist. Ct. App. 1980). It should also be noted that a bystander who summons medical aid for an injured person will not be liable for the services provided, unless of course there is an express promise to do so or a duty to pay is imposed by law (e.g., a parent requesting services for her child). In most situations, a request for services, even if the ultimate beneficiary is a third party, will obligate the requesting party to pay for the services. The obligation in this case can be based on either an implied-in-fact or an implied-in-law contract, the "benefit" for the latter being the performance of the obligor's request. *See, e.g.*, Earhart v. William Low Co., 600 P.2d 1344 (Cal. 1979). When one requests medical services for an injured third party, the requestor would generally lack the necessary intent to create an implied-in-fact contract. More importantly, however, a court will not find an implied-in-law contract because public policy demands that persons not be discouraged in any way from seeking aid for the injured. *See, e.g.*, Cleveland Anesthesia Group v. Krulak, 135 N.E.2d 685, 687 (Ohio Ct. App. 1956); Skelly Oil Co. v. Medical & Surgical Clinic, 418 S.W.2d 574, 577 (Tex. Civ. App. 1967).

saves the patient's life, the absurdity of an enrichment standard becomes even clearer.[204] Because of this, it has been universally held that the physician's recovery in these cases should also be the reasonable or fair market value of the services rendered, subject to the same methods of determination as before.[205]

While the divergences from the norm that exist with regard to physicians recovering in quantum meruit are minor and easily understood, they indicate some of the problems that courts face when dealing with quantum meruit claims. In other situations, the resolution of these problems becomes more difficult, and courts vary in their results. Public policy and notions of fairness, as well as other legal principles, may go in opposite directions, thereby requiring a delicate balancing. Such is the case in the areas of government contracts, "palimony," and attorneys' fees. The special relationships between the parties in these cases inevitably lead to modification and diversity in the application of quantum meruit.

B. The Application of Quantum Meruit When Discharged Lawyers Sue Clients under Contingency Fee Agreements

Another area in which the normal rules of quantum meruit have been distorted concerns discharged attorneys seeking to recover fees based upon a contingency fee contract.[206] The use of contingency fee agreements has at times been heralded and at other times criticized.[207] The application of quantum meruit to these situations has likewise produced varying results. Notions of public policy and fairness do not lead to one particular conclusion, and selecting the proper approach depends upon whose interests are to receive the most protection.

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204. Equally absurd would be the case in which the patient dies despite the efforts of the physician. Absent malpractice, the physician should be able to recover for the work performed. To do otherwise would discourage physicians from treating the gravely ill.

205. Forsyth County Hosp. Auth., Inc. v. Sales, 346 S.E.2d 212, 214 (N.C. Ct. App. 1986).

206. While this section is limited to a discussion of contingency fee agreements, problems also exist when attorneys seek to recover under noncontingent fee agreements or no agreement at all. For discussions of these two situations, see generally Allan E. Korpela, Annotation, *Comment Note: Amount of Attorneys' Compensation in Absence of Contract or Statute Fixing Amount*, 57 A.L.R.3D 475 (1974) and V. Woerner, Annotation, *Measure or Basis of Attorney's Recovery on Express Contract Fixing Noncontingent Fees, Where He is Discharged Without Cause or Fault on His Part*, 54 A.L.R.2D 604 (1957).

207. *See, e.g., Contingency Fees: Three American Lawyers Speak Their Minds*, LAW INST. J., Dec. 1988, at 1180.

1. Lawyers Discharged with Cause

Most of the problems in the attorney fee area can be traced to the fact that a client has the *absolute* right to discharge her lawyer at any time, with or without cause.[208] When the lawyer is discharged *with* cause, the only possible means of recovery by the lawyer is in quantum meruit.[209] A discharge with cause essentially amounts to a breach by the lawyer, not the client, and any recovery of fees by the lawyer should equal the reasonable value of the services the client received, offset, of course, by any damages caused by the lawyer.[210] Determining that reasonable value can be difficult, as many factors will be relevant. This determination will generally follow that used when the discharge is without cause;[211] however, the fact that the client had good cause to discharge an attorney will almost certainly become a prominent factor. It must be noted that at least one jurisdiction has consistently denied *any* recovery by an attorney who has been discharged with cause.[212]

2. Lawyers Discharged without Cause

a. Traditional rule: Recovery under the terms of the contract

The situation becomes clouded when the client discharges the attorney without cause. This may occur, for example, when the client simply loses confidence in the attorney. Under traditional contract law, such a discharge would constitute a breach by the client, enabling the attorney to recover damages based upon the express terms

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208. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 cmt. 4 (1990). "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." *Id.*

209. 7A C.J.S. *Attorney & Client* § 290 (1980).

210. Rocha v. Ahmad, 676 S.W.2d 149, 156 (Tex. Ct. App. 1984). "If the former client pleads and proves good cause for discharge, . . . the attorney is not entitled to recover under the contract of employment. In such a case, the attorney may attempt to recover a fee for services rendered up to the time of discharge under quantum meruit." *Id. See also* Fracasse v. Brent, 494 P.2d 9, 13 (Cal. 1972) (en banc) (stating that an attorney discharged with or without cause is entitled to receive the reasonable value of services rendered at the time of discharge); Fox & Assocs. v. Purdon, 541 N.E.2d 448, 450 (Ohio 1989) (asserting that quantum meruit does not create a threat that a discharged attorney will not be compensated for services rendered before discharge). Note that this follows the previously discussed general quantum meruit rules. *See supra* text accompanying notes 192-95.

211. See *infra* text accompanying notes 264-75 for a discussion of how courts determine a reasonable fee in quantum meruit for attorneys discharged without cause.

212. Teichner v. W & J Holsteins, Inc. 478 N.E.2d 177, 178 (N.Y. 1985). No rationale, such as breach of fiduciary duty, was given by the court in this case.

of the contingent fee contract.[213] While this contract-based recovery has been labeled the "traditional rule,"[214] today it is recognized by only a small minority of jurisdictions.[215] This traditional mode of compensation follows closely basic contract law, but many commentators and judges have failed to discuss adequately the reasoning behind applying it.[216]

One of the most thoughtful approaches to using the traditional rule appears to be that of the Idaho Supreme Court in *Anderson v. Gailey*.[217] The facts in *Anderson* were rather straightforward: Attorney One was hired on a contingent fee basis (40%); Attorney One succeeded in obtaining a judgment which was later reversed; while preparing for a second trial, Attorney One was discharged without cause; Attorney Two then obtained a favorable settlement.[218] The sole issue before the court concerned the compensation of the two attorneys involved in the case.

In ruling that Attorney One was entitled to damages for the former client's breach, the court in *Anderson* stated:

> [T]he purpose of awarding damages for breach of contract is to fully recompense the non-breaching party for its losses sustained because of the breach, not to punish the breaching party. Application of this principle of course requires that the court in fixing damages account for the savings which inure to the non-breaching party because he is relieved of his duty to perform by the breach.[219]
>
> In the context of a breach of contract for personal services, this rule entitles the wrongfully discharged employee or agent to recover the contract price diminished by the expenses saved and by the amount he received or could have earned from other suitable employment available because of his discharge.[220]
>
> We are mindful that the client must be free to retain counsel whom he trusts and in whom he has confidence and to discharge an attorney with

213. Tonn v. Reuter, 95 N.W.2d 261, 265 (Wis. 1959).

214. Louis A. Etoch, Note, Henry, Walden & Davis v. Goodman: *The Value of a Discharged Attorney's Contingent Fee Contract in Arkansas*, 42 ARK. L. REV. 549, 551 (1989).

215. *See, e.g.*, Lockley v. Easley, 786 S.W.2d 573 (Ark. 1990); Anderson v. Gailey, 606 P.2d 90 (Idaho 1980); Walters v. Hastings, 500 P.2d 186 (N.M. 1972); White v. American Law Book Co., 233 P. 426 (Okla. 1924); Crawford v. Logan, 656 S.W.2d 360 (Tenn. 1983); Knoll v. Klatt, 168 N.W.2d 555 (Wis. 1969).

216. *See, e.g.*, Michael L. Closen & Zachary A. Tobin, *The Contingent Contingency Fee Arrangement: Compensation of the Contingency Fee Attorney Discharged by the Client*, 76 ILL. B.J. 916 (1987).

217. 606 P.2d 90 (Idaho 1980).

218. *Id.* at 91.

219. *Id.* at 95.

220. *Id.* The deduction for other compensation that was received or could have been received does not follow general contract principles. *See infra* notes 226-27 and accompanying text.

> whom he is dissatisfied. But we do not believe that these interests and considerations preclude the application of basic principles of contract law.[221]

While such a determination may seem difficult, the court nevertheless remanded the case for a proper determination of damages.[222]

The Idaho court erred in two ways. First, it misstated the applicable rule for avoidable consequences for discharged attorneys. An attorney who has been discharged by a client should not be required to subtract the profit earned on the next client from the profit she would have made on the first client. The rule for independent contractors should have been used rather than the rule for personal servants.[223] An attorney has the capacity to pursue the cases of many clients at the same time.[224]

The second error of the Idaho court was not anticipating the change in position that other state supreme courts would take when faced with the conflict between an attorney's contractual right to damages and a client's absolute right to discharge a lawyer at any time, which is preserved in the Canons of Ethics and Rules of Professional Conduct.[225] If a discharged attorney is permitted to recover under the terms of the contract, it should be apparent that the client may be forced to pay two contingent fees.[226] While the deduc-

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221. *Anderson*, 606 P.2d at 95.

222. *Id.* at 96. The court did not consider the compensation of Attorney Two, since the client and Attorney Two had agreed that the compensation would be the stipulated contingent fee minus whatever Attorney One was awarded. *Id.* at n.5. Likewise, the court did not decide whether a discharged attorney could elect a quantum meruit recovery. *Id.* at n.6.

223. The attorney should be treated as an independent contractor with multiple capacity, and not as a personal services employee who would have the standard mitigation duty. *See generally* CALAMARI & PERILLO, *supra* note 195, §§ 14-16 (discussing mitigation in the context of independent contractors); RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. d, illus. 10 (1981) (same).

The *Anderson* court is the only one to insist on such a deduction; others merely require a deduction for any expenses saved. *See, e.g.*, Tonn v. Reuter, 95 N.W.2d 261, 265 (Wis. 1959) (holding that damages should amount to the contingent fee "less a fair allowance for the services and expenses which would necessarily have been expended by the discharged attorney in performing the balance of the contract").

224. An "in-house" attorney, one whose services are rendered exclusively for one client, would be an exception to this general proposition. Such an "in-house" attorney would be considered a personal services employee, and, if fired, would be required to seek other employment or have the earnings from such available substitute employment subtracted from any damages from the company which fired him. *See generally* CALAMARI & PERILLO, *supra* note 195, §§ 14-16 (discussing mitigation in the context of personal services employees).

225. *See supra* note 210.

226. *See, e.g.*, Salopek v. Schoemann, 124 P.2d 21 (Cal. 1942). "The client may frequently be forced to choose between continuing the employment of an attorney in whom he has lost faith, or risking the payment of double contingent fees equal to the greater portion of any amount eventually recovered." *Id.* at 25 (Gibson, C.J., concurring). *See also* Jones v. Brown, 190 P.2d 956 (Cal. App. 1948) (allowing a discharged attorney to recover one-third of the client's recovery after

tion of expenses saved might be a possible way to lessen the first attorney's recovery, many courts have concluded that the possibility of a double contingency fee has the effect of discouraging clients from exercising their right to discharge their attorney.[227] As the Arkansas Supreme Court noted:

> The relationship between the attorney and his client must be based upon the utmost trust and confidence, and if that basis has been substantially undermined, the relationship should be terminated. . . . It would be an injustice to the client to hold him liable for both contingency fees for exercising that fundamental right.[228]

Indeed, this is precisely what has caused most jurisdictions to permit only recovery on a quantum meruit basis.[229] It is interesting to note that many of the courts that have recently upheld recoveries of the contingent fee by the discharged attorney have not dealt with the prospect of a large, double recovery.[230] Those that have been faced with such a problem have generally succumbed to the newly emerging majority rule.[231]

One very notable exception to the trend toward permitting lawyers discharged without cause to recover only on a quantum meruit basis is the state of Arkansas. In 1987, the Arkansas Supreme Court reversed its earlier decisions on the issue and decided to follow the trend by rejecting the traditional rule of permitting recoveries under the terms of a contingency fee contract.[232] The court's reasoning was quoted above,[233] and its decision was not at all unexpected. The Arkansas legislature, however, disagreed and adopted Act 293 of 1989,[234] which expressly overturned the court's deci-

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second attorney had been paid 40%).

227. *See, e.g., Salopek,* 124 P.2d. at 25.

228. Henry, Walden & Davis v. Goodman, 741 S.W.2d 233, 236 (Ark. 1987).

229. *See, e.g., id.*; Fracasse v. Brent, 494 P.2d 9 (Cal. 1972) (en banc); Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982); Rhoades v. Norfolk & W. Ry., 399 N.E.2d 969 (Ill. 1979).

230. For example, see Anderson v. Gailey, 606 P.2d 90, 91 (Idaho 1980), where the second attorney agreed to divide the fee with the discharged attorney; Walters v. Hastings, 500 P.2d 186 (N.M. 1972), in which there was a settlement of claim after discharge without the use of second attorney; Adams v. Mellen, 618 S.W.2d 485 (Tenn. Ct. App. 1981), in which the court never discussed compensation of second attorney; and Tonn v. Reuter, 95 N.W.2d 261, 266 (Wis. 1959), where the court said that the payment of a second attorney was not an issue on appeal.

231. *See, e.g.,* Fox & Assocs. v. Purdon, 541 N.E.2d 448 (Ohio 1989) (stating that the "traditional rule" would have lead to attorney's fees of more than $8,000 out of an $11,500 settlement).

232. *Henry, Walden & Davis,* 741 S.W.2d at 236.

233. *See supra* text accompanying notes 219-21.

234. 1989 Ark. Acts 293 (codified at ARK. CODE ANN. §§ 16-22-301 to 16-22-307 (Michie Supp. 1991)).

sion.[235] The pertinent portion of the act states that "[t]he compensation of an attorney . . . for his services is governed by agreement, expressed or implied, which is not restrained by law."[236] While it is still too early to tell what effect, if any, this enactment will have on the courts and legislatures of other states, it is clear that the Arkansas legislature does not treat the client's absolute right to discharge with much respect, and has overruled the Arkansas Supreme Court's adoption of the new majority rule.

A related issue is the question of whether an attorney entitled to recover under the terms of the contingency fee contract may elect to recover in quantum meruit instead. Another basic tenet of contract law is the availability of a choice of remedies which may be elected by a nonbreaching party.[237] While these principles would permit an attorney to elect between a recovery on the express terms of the contract or a recovery based upon quantum meruit,[238] many of the courts that have permitted recovery of a contingent fee do not address the question of whether a remedy was also available in quantum meruit.[239] The previously mentioned Arkansas enactment, how-

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235. Lockley v. Easley, 786 S.W.2d 573, 575-76 (Ark. 1990). "Act 293 expressly declares the holding of the *Goodman* case to be inconsistent with legislative intent behind the Attorneys [sic] Lien Law. The act explicitly provides that attorneys may rely on their contractual rights with clients and are entitled to obtain a lien for services based on such agreements." *Id.*

236. ARK. CODE ANN. § 16-22-302 (Michie Supp. 1991) The act expressly stated "that an attorney should have the right to rely on his contract with his client; and that the Attorney's Lien Law should be reenacted to protect the contractual rights of attorneys." *Id.* § 16-22-301. The legislature went on to state that the act was intended "to allow an attorney to obtain a lien for services based on his or her agreement with his or her client and to provide for compensation in case of a settlement or compromise without the consent of the attorney." *Id.*

237. *See supra* text accompanying notes 181-91.

238. Howell v. Kelly, 534 S.W.2d 737 (Tex. Ct. App. 1976):

> A party who has been damaged by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have received if he had not been prevented from performing.

Id. at 739-40. *See also* Crawford v. Logan, 656 S.W.2d 360, 364 (Tenn. 1983) (stating that an attorney dismissed with cause is entitled to either a quantum meruit or contract recovery, whichever is less, while an attorney dismissed without cause is entitled to the larger of the two recoveries).

239. *See, e.g.*, Anderson v. Gailey, 606 P.2d 90 (Idaho 1980); Tonn v. Reuter, 95 N.W.2d 261 (Wis. 1959). *But see Crawford*, 656 S.W.2d 360. The likely reason for the failure to discuss an election of remedies is that the attorney's recovery under the contingency fee contract will almost always be greater than the amount recoverable under traditional quantum meruit valuation. This is often precisely the attorney's motivation for entering such a contract. The risk of not recovering for the client may be great, however, the possible rewards to the attorney usually compensate for

ever, apparently recognizes the right to elect a quantum meruit recovery since it expressly states that an attorney's recovery is not "necessarily limited to the amount, if any, of the compromise or settlement between the parties litigant."[240] In any event, the application of quantum meruit to attorneys' fees will be examined more fully in the next section.

b. Recovery only in quantum meruit

The rule in most jurisdictions today is that a discharged attorney may recover *only* on a quantum meruit basis.[241] These cases, however, have generally created a hybrid form of quantum meruit in order to preserve the client's absolute right to discharge an attorney.

While the first jurisdiction to rule in this way was New York in *Martin v. Camp,*[242] the case most often cited as establishing today's new rule is *Fracasse v. Brent.*[243] In *Fracasse,* the Supreme Court of California held that a client's discharge of her attorney, with or without cause, "does not constitute a breach of contract for the reason that it is a basic term of the contract, implied by law into it by reason of the special relationship between the contracting parties, that the client may terminate the contract at will."[244] Since a client has an absolute right to discharge an attorney, with or without cause, "[i]t would be anomalous and unjust to hold the client liable in damages for exercising that basic implied right."[245] In other words, there can be no election to recover contract damages instead of quantum meruit since there has been no breach. The proper analysis would be that the contract is a nullity, thereby relegating any claim by the attorney to one on a contract implied in law, or quasi-contract. As such, the only recovery permitted in this situation is one in quantum meruit.[246]

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this added risk.

240. ARK. CODE ANN. § 16-22-303(b)(1) (Michie Supp. 1991).

241. *See, e.g.,* Fracasse v. Brent, 494 P.2d 9 (Cal. 1972) (en banc); Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982); Hopkins v. Steele, 297 S.E.2d 528 (Ga. 1982); Susan E. Loggans & Assocs. v. Estate of Magid, 589 N.E.2d 603 (Ill. App. Ct. 1992); Madison v. Goodyear Tire & Rubber Co., 663 P.2d 663 (Kan. Ct. App. 1983); Lawler v. Dunn, 176 N.W. 989 (Minn. 1920); Covington v. Rhodes, 247 S.E.2d 305 (N.C. Ct. App. 1978); Martin v. Camp, 114 N.E. 46 (N.Y. 1916); Fox & Assocs. v. Purdon, 541 N.E.2d 448 (Ohio 1989).

242. 114 N.E. 46 (N.Y. 1916).

243. 494 P.2d 9 (Cal. 1972) (en banc).

244. *Id.* at 13.

245. *Id.*

246. *See supra* text accompanying notes 172-80.

While there clearly are policy arguments both for and against treating contingent fee contracts in this way, the greater problem becomes the technical one of the application of quantum meruit principles to this situation. Many courts continue to struggle with the proper measure of compensation, when such compensation is due, and whether or not there should be a limit on the amount recoverable.[247] The ultimate goal to be achieved by the use of quantum meruit is that the attorney be compensated for the reasonable value of her or his services up until the time of discharge, yet all the while preserving the client's absolute right to discharge the attorney.[248]

i. Contract price as a limit on the quantum meruit recovery

In traditional quantum meruit as an alternative contract remedy, the contract price will *usually* limit a recovery only when a breaching party seeks to recover the amount by which the nonbreacher has been enriched.[249] In this case, a "ratable portion" of the contract acts as a ceiling on the claimant's recovery.[250] If the claimant did not breach the contract, then fair market value will be the measure of recovery, regardless of the contract price.[251] This is also true when the claimant is seeking recovery under an implied-in-law contract because an express contract cannot be enforced. This could occur, for example, when the express contract is unenforceable because it violates the Statute of Frauds.[252] If the defendant refuses to perform under the unenforceable contract, the plaintiff's recovery in quantum meruit should not be limited by the contract price.[253] The reasoning behind such a rule is simple: the defendant should not be able to benefit by his or her breach (or refusal to perform).[254] All of

247. *See, e.g., Fracasse,* 494 P.2d 9; Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982).

248. Chambliss, Bahner & Crawford v. Luther, 531 S.W.2d 108, 113 (Tenn. Ct. App. 1975).

249. *See supra* text accompanying notes 192-95.

250. RESTATEMENT (SECOND) OF CONTRACTS § 374 (1981). *See also supra* text accompanying note 194.

251. RESTATEMENT (SECOND) OF CONTRACTS § 371 (1981). *See also supra* text accompanying note 184.

252. *See, e.g.,* Bond v. Oak Mfg. Co., 293 F.2d 752 (3d Cir. 1961).

253. WOODWARD, *supra* note 40, at 165. *See also* United States v. Zara Contracting Co., 146 F.2d 606, 607 (2d Cir. 1944) (allowing collection of not only the contract price but also the additional cost of "unexpected" soil conditions).

254. WOODWARD, *supra* note 40, at 165.

> Where the value of the plaintiff's performance exceeds the contract price, he may realize, it is true, returns larger than he contemplated when entering into the contract. If it is the *defendant* who has refused to perform the contract, no injustice

this can essentially be traced back to the fact that quantum meruit is based on equitable considerations, and attempts to compensate only for *unjust* enrichment.[255]

Returning to the case of attorneys' fees, the decisions do not comport well with the above analysis. In order to reach what is felt to be a more equitable result, many courts limit the recovery in quantum meruit by an attorney discharged without cause to the contract price.[256] In cases not involving attorneys, the contract price limit is usually imposed only on breaching parties.[257] If such a limit were not in place when lawyers sue clients for fees, the client could be penalized even more than under the traditional rule, and the discharged attorney may "receive a fee greater than he bargained for under the terms of his contract."[258] Thus, the same justification behind the abandonment of the traditional rule is applicable. If the client has an absolute right to discharge the attorney, the client should not be faulted or penalized for doing so. Any inequities to the attorney, such as discharges immediately prior to a lucrative settlement agreement, may sometimes be addressed in determining the amount of the attorney's recovery.[259] The result, however, is that the attorney is being treated more like a breaching party, who is generally limited in his quantum meruit recovery.

ii. Effect of the occurrence or nonoccurrence of the contingency

Another problem that inevitably arises is whether the recovery by the attorney is predicated upon the occurrence of the contingency itself. In dealing with this, the courts have generally been split.

> results. The defendant suffers no loss, and moreover, if the plaintiff's recovery were limited to the contract rate the defendant might actually profit by the contract which he refuses to perform. If, on the other hand, it is the *plaintiff* who is in default, the contract price should ordinarily be the limit of his recovery — assuming, of course, that he should be allowed to recover at all. Otherwise he might profit by his default.

Id.

255. *See supra* text accompanying notes 172-78.

256. *See, e.g.*, Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982).

257. *See supra* text accompanying notes 192-95.

258. *Rosenberg*, 409 So. 2d at 1021.

> [T]here is an overriding need to allow clients freedom to substitute attorneys without economic penalty as a means of accomplishing the broad objective of fostering public confidence in the legal profession. Failure to limit quantum meruit recovery defeats the policy against penalizing the client for exercising his right to discharge.

Id. See Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53 (Mo. 1982) (en banc). *But see* Hoddick, Reinwald, O'Connor & Marrack v. Lotsof, 719 P.2d 1107 (Haw. Ct. App. 1986).

259. *See infra* text accompanying notes 264-67.

While some permit the discharged attorney to be compensated before or without the occurrence of the contingency (i.e., a recovery by the client),[260] others allow compensation only when the contingency occurs.[261] Thus, under the latter approach, if the client recovers nothing, the discharged attorney is likewise not compensated. This approach further hybridizes the recovery because although the contract has been rendered a nullity by the discharge, the court retains that portion relating to the contingency. By following such a rule, these courts essentially place the discharged attorney at the mercy of his former client and any attorney subsequently hired by her. If the client simply drops the suit or the second attorney fails to recover anything, the discharged attorney will receive nothing.[262] This reason alone could perhaps be seen as shifting the equities of the case so that the attorney's recovery would not depend upon the occurrence of the contingency. On the other hand, permitting recovery by the discharged attorney when the client has in fact received nothing runs counter to the reasons for permitting contingent fee arrangements in the first place and also acts as another hindrance on the client's right to discharge his attorney.[263]

In any event, the questions of the contract price as a limit and the

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260. *See, e.g.*, Trenti, Saxhaug, Berger, Roche, Stephenson, Richards & Aluni, Ltd. v. Nartnik, 439 N.W.2d 418, 421 (Minn. Ct. App. 1989) ("Once a contingent fee agreement is terminated by the client, the attorney, like any workman or supplier, is entitled to prompt payment for the reasonable value of services performed."). Justice Sullivan, in his dissent in *Fracasse v. Brent*, stated:

> [T]he majority also say that plaintiff's recovery for even the reasonable value of his services is subject to the contractual term that compensation is contingent upon the success of the defendant's personal injury suit. By thus selectively retaining parts of the contract, even though it has been disaffirmed, the majority violate the rule that the contract must be preserved or eliminated in its entirety. Their explanation that plaintiff agreed "to take his chances on recovering any fee whatever" disregards the substantial change in risk that results when plaintiff is prevented from managing the litigation.

Fracasse v. Brent, 494 P.2d 9, 23 (en banc) (Sullivan, J., dissenting).

261. *See, e.g., Fracasse*, 494 P.2d at 14 ("[T]he attorney's action for reasonable compensation accrues only when the contingency stated in the original agreement has occurred.").

262. This is also a factor when the court imposes the contract price as a limit on the quantum meruit recovery. If the second attorney does a poor job in representing the client, the "contract price" that controls may be significantly lower, or even nonexistent.

263. The court in *Rosenberg v. Levin* stated the public policy consideration upon which the modified quantum meruit is based:

> We approve the philosophy that there is an overriding need to allow clients freedom to substitute attorneys without economic penalty as a means of accomplishing the broad objective of fostering public confidence in the legal profession. Failure to limit quantum meruit recovery defeats the policy against penalizing the client for exercising his right to discharge.

Rosenberg v. Levin, 409 So. 2d 1016, 1021 (Fla. 1982).

occurrence of the contingency are certainly intertwined. It seems difficult, if not impossible, for the contract price to act as a limit without also requiring that the contingency called for actually occur. Neither issue can be positively resolved without jeopardizing the rights of either the attorney or the client, and it may be more logical to consider both as factors to be pondered when placing a value on the attorney's services.

In summary, below is a chart reviewing the traditional and quantum meruit recoveries for attorneys discharged without cause in contingency fee arrangements.

Attorneys Discharged Without Cause

Traditional Rule — Contract Terms Control

Quantum Meruit
- Terms of Contract Irrelevant
- Contract Price = Upper Limit of Recovery
- No Recovery Unless Contingency Occurs
- Both Contract Price *and* Occurrence of Contingency Controls ("Full Hybridization")

iii. Measuring the attorney's recovery in quantum meruit

In determining the value of the attorney's services, most courts look to similar factors. Under traditional quantum meruit, the measure of the benefit received by the client, and thus the attorney's recovery in quantum meruit, should be the fair market value of the attorney's services. This is true because the client requested that the work be performed on his behalf.[264] One might expect that this would merely be the number of hours expended by the attorney multiplied by a reasonable hourly rate. Courts, however, will generally look to other factors in determining the attorney's compensation.[265] These include: "the skill and standing of the attorney employed, the nature of the cause, the novelty and difficulty of the

264. *See supra* text accompanying notes 175-78, 184-91. This is true regardless of whether one views the claim as one on an implied-in-law contract or as an alternative contract remedy.

265. "A simple multiplication of hours by a minimum hourly fee is not by itself a proper method to determine such charges." Hermann, Cahn & Schneider v. Viny, 537 N.E.2d 236, 241 (Ohio Ct. App. 1987).

questions, the amount and importance of the subject matter, the degree of responsibility involved in the management of the case, the time and labor required, the usual and customary charges in the community and the benefits resulting to the client."[266] Some courts even consider the contingent fee contract itself to be relevant to a valuation of the attorney's recovery.[267]

While this detailed analysis certainly differs from either of the usual methods of determining a quantum meruit recovery (amount defendant benefitted or fair market value of services), the purpose of such an inquiry would seem to be to account for any of the inequities that might be present because of the unique situation.[268] In fact, numerous courts have even stated that where an attorney is discharged without cause "on the courthouse steps," the above analysis can lead to the attorney recovering the full contingency fee.[269] A reading of most of the cases, however, indicates that the number of hours spent on the case will often be the most significant factor in determining a recovery. This is true even though the attorney working under a contingent fee contract may not always keep detailed time records.[270] The court could then turn to a "lodestar" approach for quantum meruit recoveries, although the "lodestar" has not been used to date in this area.[271]

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266. Ashby v. Price, 445 N.E.2d 438, 444 (Ill. App. Ct. 1983). *See* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) (using similar factors). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1982); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1983).

267. *See, e.g., Rosenberg*, 409 So. 2d at 1022. "[T]he trial court can consider the totality of the circumstances surrounding the professional relationship between the attorney and client. Factors such as time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract itself will necessarily be relevant considerations." *Id.*

268. Most courts do not refer exclusively to either the amount the client has benefitted or the fair market value of the attorney's services. Rather, they often state that the attorney should recover a "reasonable fee." *See, e.g.*, Martin v. Camp, 114 N.E. 46, 48 (N.Y. 1916).

269. *See, e.g.*, Fracasse v. Brent, 494 P.2d 9, 14 (Cal. 1972) (en banc). "To the extent that such discharge occurs 'on the courthouse steps,' where the client executes a settlement obtained after much work by the attorney, the factors involved in a determination of reasonableness would certainly justify a finding that the entire fee was the reasonable value of the attorney's services." *Id.*

270. See Susan E. Loggans & Assocs. v. Estate of Magid, 589 N.E.2d 603, 606-10 (Ill. App. Ct. 1992), for a discussion of evidentiary problems in this area.

271. *See* Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp. (Lindy II), 540 F.2d 102 (3rd Cir. 1976); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp. (Lindy I), 487 F.2d 161 (3rd Cir. 1973). These cases establish a "lodestar" approach, explained in GEOFFREY C. HAZARD & SUSAN P. KONIAK, THE LAW AND ETHICS OF LAWYERING (1990):

> Under this approach a basic figure of "lodestar" is derived by multiplying the number of hours reasonably expended by a reasonable hourly rate for the attorney's services.

iv. The Louisiana reasonable percentage approach

A unique approach to valuing an attorney's quantum meruit recovery, which has yet to be followed by other jurisdictions, is that of the Louisiana Supreme Court. In *Saucier v. Hayes Dairy Products, Inc.*,[272] the court adopted what can only be labeled a "hybrid" version of the two prevailing rules. That court, in exercising its "authority to regulate the practice of law," held that the client should pay only "the highest ethical contingency percentage to which the client contractually agreed in any of the contingency fee contracts which he executed."[273] This contingency fee is then "allocated between or among the various attorneys involved in handling the claim in question, such fee apportionment to be on the basis of factors which are set forth in the Code of Professional Responsibility."[274] Instead of giving the discharged attorney the reasonable value of her services, this method of apportionment is more aptly described as compensating the discharged attorney for her "reasonable percentage."

While the approach that the *Saucier* court took arguably is the most equitable for the client, it remains to be seen if any other courts will subscribe to such a view. One difficulty that the client may face, however, is obtaining a second attorney to represent him. While it is a sound judicial approach to a complex problem, the "reasonable percentage" rule does not comport well with any traditional contract principles.[275]

3. Conclusion — Attorneys' Fees

The courts' decisions regarding quantum meruit and contingent fee contracts certainly vary quite a bit, and some of their reasoning cannot be reconciled with traditional contract principles. In order to enable clients to exercise their absolute right to discharge their at-

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> The "lodestar" sum may then be adjusted upward or downward to reflect the contingent nature of the case or the unusual quality (good or bad) of the legal service in the particular case.

Id. at 485.

272. 373 So. 2d 102 (La. 1978).

273. *Id.* at 118.

274. *Id. But see Susan E. Loggans & Assocs.*, 589 N.E.2d at 614 (rejecting such an apportionment).

275. The only analogy that can be drawn is to the rule limiting a breaching party's recovery in quantum meruit to a "ratable portion" of the contract price. *See supra* text accompanying note 194.

torneys, most courts limit the fees discharged attorneys can recover by the application of a hybrid form of quantum meruit. Many essentially treat the attorney discharged without cause as a breaching party, limiting any fee recovery by contract contingencies and contract price. The issue will certainly lead to much more debate in the future, and the enactment by the Arkansas legislature may lead others to evaluate their positions. One thing that the majority rule should impress upon attorneys is that they may have to prove both the work done and the market value of that work in order to recover. The wedding between attorneys and time sheets is complete, and this is true even when the time sheet would not normally be used, such as in cases with the contingency of winning. Every attorney runs the risk of being discharged and needing proof of effort in order to recover any fee.

C. *Government Contracts and Quantum Meruit*

Cases involving contractual claims against the federal government have produced some of the most confusing and inconsistent results involving quantum meruit. Problems due to the ancient doctrine of sovereign immunity have led courts to misapply the basic principles of quantum meruit and contract law in order to find a remedy. While the final outcomes may arguably be just, the paths taken to get there do not always comport with settled principles.

1. Sovereign Immunity and the Tucker Act

The doctrine of sovereign immunity has its roots in medieval law and is based upon the adage that "the King can do no wrong."[276] Although sovereign immunity is not specifically provided for in the Constitution,[277] it has survived to this day.[278] In its more modern sense, the doctrine simply means that the government "may not be

276. Wall & Childres, *supra* note 53, at 587 n.1. For a discussion of the history of sovereign immunity, see W.S. Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. REV. 141 (1922).

277. Nevada v. Hall, 440 U.S. 410, 428 (1979) (Blackmun, J., dissenting) (disagreeing with the majority contention that "sovereign immunity has no constitutional source").

278. *See* Owen v. City of Independence, 445 U.S. 622, 645 n.28 (1980) ("[I]t has never been understood how the doctrine of sovereign immunity came to be adopted in the American democracy . . . ."). As one author has stated, "It is a magnificent historical irony that America, a republic whose independence was declared in a document indicting the sovereign for treasonous acts, should adopt without serious examination the doctrine of sovereign immunity." Jeremy Travis, Note, *Rethinking Sovereign Immunity After* Bivens, 57 N.Y.U. L. REV. 597, 607 (1982).

sued without its consent."[279] The Supreme Court has justified such a principle by stating that the doctrine is based upon "the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[280]

Prior to the passage of the Tucker Act[281] in 1887, grievances against the federal government could only be remedied by means of private bills.[282] The Tucker Act specifically conferred jurisdiction in the Court of Claims[283] for "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[284] The Tucker Act constituted the requisite consent by the government to be sued on these specific types of claims; in other words, the Act was a congressional "waiver of sovereign immunity with respect to those claims."[285] Although significant changes have been made as far as *where* an action must be brought, especially with the adoption of the Contract Disputes Act of 1978,[286] the scope of the congressional waiver of sovereign immunity regarding contractual claims embodied in the Tucker Act has remained unchanged: the federal government may be sued upon any express or implied contract.[287]

While all may seem straightforward as far as quantum meruit claims against the federal government are concerned, there is one important limitation that has been imposed upon the Tucker Act and all of its progeny: actions based upon contracts implied in law may *not* be maintained against the government.[288] Theoretically,

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279. United States v. Mitchell, 463 U.S. 206, 212 (1983).

280. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

281. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505.

282. Wall & Childres, *supra* note 53, at 589-90.

283. The Court of Claims was established in 1855; however, before the passage of the Tucker Act it only acted in an advisory capacity leaving the final decision on a claim to Congress. Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612. *See Mitchell,* 463 U.S. at 213-15.

284. 28 U.S.C. § 1491(a)(1) (1988). The Tucker Act also granted concurrent jurisdiction to the district and circuit courts, depending on the amount of the claim.

285. *Mitchell,* 463 U.S. at 212. "If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit." *Id.* at 216. Note, however, that the Tucker Act did not create any substantive rights, rather it only conferred jurisdiction on the courts to hear specific types of grievances against the federal government. *See* Hatzlachh Supply Co. v. United States, 444 U.S. 460, 465 n.5 (1980).

286. Pub. L. No. 95-563, 92 Stat. 2383 (1978) (codified as amended at 41 U.S.C. §§ 601-613 (1988)).

287. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (1988).

288. *Mitchell,* 463 U.S. at 219; Merritt v. United States, 267 U.S. 338, 341 (1925).

therefore, a quantum meruit claim against the government could only be brought upon an express or implied-in-fact contract. The phrase "any express or implied contract," as contained in the Tucker Act, has generally been interpreted to entail only actual contracts, either express or implied-in-fact.[289] This interpretation is apparently based on congressional intent, although no such justification can be found in either the legislative history[290] or the relevant case law.[291]

One commentator has suggested that at the time the Tucker Act was passed, the term "implied contract" did not include "quasi-contractual obligations,"[292] however the Supreme Court's decision in *Clark v. United States*[293] could be interpreted to indicate otherwise.[294] A federal district court recently justified the rule on the basis that because the government must consent to be sued, it can only be sued upon a contract that it "has actually assented to."[295] This interpretation is questionable because only Congress itself can give the requisite consent for the United States to be sued.[296]

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289. *Merritt*, 267 U.S. at 340-41.

290. Wall & Childres, *supra* note 53, at 590 n.10.

291. See Michael C. Walch, Note, *Dealing with a Not-So-Benevolent Uncle: Implied Contracts with Federal Government Agencies*, 37 STAN. L. REV. 1367, 1377 n.42 (1985), where the author states that the precedents cited by the Supreme Court in *Merritt*, namely Tempel v. United States, 248 U.S. 121 (1918), and Sutton v. United States, 256 U.S. 575 (1921), do not give any basis for the rule. "The rule has thus been adopted without either analysis or consideration of its effects." Walch, *supra*.

292. Wall & Childres, *supra* note 53, at 590 n.10.

293. 95 U.S. 539 (1877).

294. The Court in *Clark* permitted recovery on what was essentially an implied-in-law contract, without ever discussing any distinction between implied-in-fact and implied-in-law contracts. *Id.* While the case was decided before the Tucker Act, the applicable statute granted jurisdiction to the Court of Claims for claims "upon any contract, express or implied." Act of Feb. 24, 1855, ch. 122 § 1, 10 Stat. 612. As stated previously, however, before the Tucker Act the Court of Claims only advised Congress of how the claim should be resolved. *See supra* note 283. The decision in *Clark* could also merely be representative of the confusion that seems to be rampant in this area. For further discussion of *Clark*, see *infra* text accompanying notes 308-19.

295. Gray v. Rankin, 721 F. Supp. 115, 117-18 (S.D. Miss. 1989).

> [T]he United States may be sued on both express and implied-in-fact contracts because in both cases the United States has actually assented to the contractual obligation and has thereby consented to suit on the contract. Contracts implied-in-law, on the other hand, are not really contracts at all but merely remedies granted by the court to enforce equitable or moral obligations in spite of the lack of assent of the party to be charged. It follows that in no sense has the United States consented to be contractually bound by or to be sued upon a contract implied-in-law.

Id. (citations omitted).

296. United States v. Testan, 424 U.S. 392, 399 (1976). *See also* United States v. Mitchell, 463 U.S. 206, 215-16 (1983) ("The source of consent for such suits unmistakably lies in the Tucker Act. Otherwise, it is doubtful that *any* consent would exist, for no contracting officer or

2. *Can Quantum Meruit Be Utilized for Government Contracts?: The Legacy of* Clark v. United States

One of the major problems that arises concerning government contracts involves the myriad of statutes and regulations concerning such contracts. Many of the reported cases arise due to some divergence from proper procedure in the procurement process,[297] or a government official's lack of authority to contractually bind the government.[298] Besides the normal contract requirements,[299] "[a] contract with the United States can only exist if the contracting government agent has direct authority to obligate funds of the United States."[300] In addition, "the United States is not bound by a contract entered into by a government official acting beyond the scope of his authority."[301] Anyone attempting to enter into a contractual agreement with the United States "assumes the risk of accurately ascertaining that the Government's agents act within their authority."[302] In other words, if a contract is entered into with a government agent who either lacks the authority to do so, or goes beyond the granted authority, "the Government is free to disavow the contract."[303]

If the government disavows an express contract because of the lack of an agent's authority or an agent exceeding his authority, then by basic contract principles an implied-in-fact contract cannot be created to make up for the deficiency. The *only* distinction between an express contract and one that is implied in fact is the type of evidence used to establish the contract's existence;[304] all of the other requirements remain. Therefore, as the Supreme Court suc-

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other official is empowered to consent to suit against the United States.").

297. *See, e.g.*, Prestex Inc. v. United States, 320 F.2d 367, 371 (Ct. Cl. 1963) ("It is contended that the contracting officer violated specific statutory and regulatory requirements pertaining to the bid and award of public contracts . . . .").

298. *See, e.g.*, Barnett v. United States, 397 F. Supp. 631, 638 (D.S.C. 1975) ("The individual whom plaintiff claims bound the government in contract had no authority to bind the government in any contract . . . .").

299. "An implied-in-fact contract requires findings of: 1) mutuality of intent to contract; 2) consideration; and, 3) lack of ambiguity in offer and acceptance." City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990).

300. Chavez v. United States, 18 Cl. Ct. 540, 543 (1989).

301. *In re* Penn Cent. Transp. Co., 831 F.2d 1221, 1229 (3d Cir. 1987).

302. OAO Corp. v. United States, 17 Cl. Ct. 91, 99 (1989); *accord* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

303. Prestex Inc. v. United States, 320 F.2d 367, 371 (Ct. Cl. 1963).

304. An express contract is evidenced by a writing, while one implied in fact is evidenced by the conduct of the parties. *See supra* text accompanying notes 35-54.

cinctly held in *Sutton v. United States*,[305] if a government official could not have bound the United States to an express contract for the particular work performed, neither could the official have bound the government to an implied-in-fact contract for the services.[306] It would seem elementary that if a federal official entered into an express contract that violated specific statutory provisions, thus exceeding the official's authority, then there could also be no implied-in-fact contract entailing the same provisions. In such cases the only possible way that one could recover against the government should be on an implied-in-law contract basis, which would not be permitted.[307]

It should now be apparent that a quantum meruit claim against the federal government may be difficult to maintain. With the multitude of statutes and regulations regarding government contracts, it is doubtful that any express or implied-in-fact contract calling for payment of a "reasonable amount" for services would pass statutory muster. Implied-in-law contract claims supposedly are not permitted against the government, and the use of quantum meruit as an alternative contract remedy, while arguably valid when the government contract itself is upheld, has rarely been addressed. A distinct line of cases, originating before the Tucker Act was even adopted, however, has clouded this conclusion and created a tenuous line of authority for the maintenance of quantum meruit claims against the federal government.

The Supreme Court's decision in *Clark v. United States*,[308] which was mentioned previously, has done much to confuse the rules of quantum meruit as they pertain to government contracts. In *Clark*, the plaintiff had entered into an oral contract with the government for use of the plaintiff's ship.[309] A statute, however, required all such contracts to be in writing, and, as the Court stated, was the

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305. 256 U.S. 575 (1921).

306. *Id.* at 580. "[S]ince no official of the Government could have rendered it liable for this work by an express contract, none can by his acts or omissions create a valid contract implied in fact." *Id. See also* Chavez v. United States, 18 Cl. Ct. 540, 545 (1989) ("Implied-in-fact contracts must be based on the conduct of authorized employees.").

307. Woodward, in his work *The Law of Quasi Contracts*, devotes much attention to situations in which a party has relied upon an illegal contract, a contract entered into by an agent lacking authority, and a contract violating the Statute of Frauds. In all of these cases, the only possible recovery, according to Woodward, is in quasi-contract. While he never mentioned government contracts in his work, the analogy is easy to draw. *See* WOODWARD, *supra* note 40.

308. 95 U.S. 539 (1877).

309. *Id.* at 541.

"equivalent to prohibiting any other mode of making contracts."[310] While the contract was rendered void by this statute, the Court nevertheless permitted the plaintiff to recover for the use of the ship "upon an implied contract for a quantum meruit."[311]

The Court in *Clark,* while never specifically referring to either a contract implied in fact or implied in law, drew an analogy to contracts that violated the Statute of Frauds.[312] As discussed above, however, a recovery in quantum meruit when a contract is rendered void by noncompliance with the Statute of Frauds lies in quasi-contract, in other words as a contract implied in law.[313] If the recovery was on an implied-in-fact contract, then the plaintiff's recovery should have been exactly what the parties had agreed upon in the first place, not in quantum meruit for "the value of the use of his vessel."[314] An implied-in-fact contract is an actual contract, and the *intent* of the parties is what a court should enforce. In *Clark,* there was no indication that the two parties ever intended a recovery in quantum meruit should the express oral contract fail. The major shortcoming in *Clark,* therefore, is not the outcome itself, but rather the basis for the Court's decision — either an improper decision to permit a recovery on an implied-in-fact contract, or a conclusion that implied-in-law contracts could be enforced against the government.

Numerous subsequent decisions of various federal courts have followed *Clark* to the extent that they have permitted quantum meruit claims to be brought against the government when an express contract covering the services involved is invalidated.[315] The most significant fact about these cases is not that the courts often purport to find an implied-in-fact contract when one arguably cannot exist;[316]

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310. *Id.* at 542.

311. *Id.* at 543.

312. *Id.*

313. WOODWARD, *supra* note 40, at 144-73. *See supra* note 307.

314. 95 U.S. at 543. The Court did, however, permit the plaintiff to recover the contract price since it felt that this was the only evidence introduced as to the value of the services. *Id.*

315. *See, e.g.,* United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961); Crocker v. United States, 240 U.S. 74 (1916); United States v. Amdahl Corp., 786 F.2d 387 (Fed. Cir. 1986); Yosemite Park v. United States, 582 F.2d 552 (Ct. Cl. 1978); Blake Constr. Co. v. United States, 296 F.2d 393 (D.C. Cir. 1961). *But see* Chavez v. United States, 18 Cl. Ct. 540 (1989).

316. *See Amdahl Corp.,* 786 F.2d 387 (Fed. Cir. 1986). The court in *Amdahl* stated that "[a]dministrative actions taken in violation of statutory authorization or requirement are of no effect." *Id.* at 392-93. It also stated that " '[f]ailure to follow the applicable rules negates the agent's authority to enter into a contract binding on the government.' " *Id.* at 392 (quoting

rather it is that they base the plaintiff's recovery on the fact that the government has benefitted or been enriched by the plaintiff's services.[317] This is precisely the measure of damages for quantum meruit on an implied-in-law contract.[318] Had an implied-in-fact contract truly existed, the plaintiff's recovery should have been the amount the parties agreed to.[319] A case in point is *Prestex Inc. v. United States*.[320]

In *Prestex*, the plaintiff entered into a contract to supply cloth to the United States Military Academy for uniforms. The plaintiff had submitted a cloth sample with his bid that did not conform to the required specifications.[321] This was not discovered, however, until after the contract had been awarded to the plaintiff and he had produced all of the cloth necessary.[322] The court held that the contracting officer had exceeded his authority by awarding a contract to a party submitting a nonconforming bid, and therefore the contract could be disavowed.[323] In an oft-quoted passage,[324] however, the *Prestex* court demonstrated the confusion present:

> Even though a contract be unenforceable against the Government, because not properly advertised, not authorized, or for some other reason, it is only fair and just that the Government pay for goods delivered or services rendered and accepted under it. In certain limited fact situations, therefore, the courts will grant relief of a *quasi-contractual* nature when the Government elects to rescind an invalid contract. No one would deny that ordinary principles of equity and justice preclude the United States from retaining the services, materials, and benefits and at the same time refusing to pay for them on the ground that the contracting officer's promise was unauthorized,

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Thomas R. Brous, *Termination for Convenience: A Remedy for the Erroneous Award*, 5 PUB. CONT. L.J. 221, 222 (1972)). Nevertheless, the court decided that a recovery on an implied-in-fact contract was permissible, even though the government's agent had exceeded his authority in entering into the express contract. *Id.* at 393.

317. *Id.* ("Where a benefit has been conferred by the contractor on the government in the form of goods or services, which it accepted, a contractor may recover at least on a *quantum valebant* or *quantum meruit* basis for the value of the conforming goods or services received by the government prior to the rescission of the contract for invalidity.").

318. *See supra* text accompanying notes 175-78. While it is true that this can also be the measure of recovery in quantum meruit as an alternative contract remedy, these courts invariably base the recovery against the federal government on implied-in-fact contracts. *See supra* text accompanying notes 282-96. However, these courts could not have properly used such a remedy since they would first have to find a presently valid express or implied-in-fact contract.

319. *See supra* text accompanying notes 166-68.

320. 320 F.2d 367 (Ct. Cl. 1963).

321. *Id.* at 368-71.

322. *Id.*

323. *Id.* at 371-72.

324. *See, e.g.*, United States v. Amdahl Corp., 786 F.2d 387, 393 (Fed. Cir. 1986); Ocean Technology, Inc. v. United States, 19 Cl. Ct. 288, 294 (1990).

> or unenforceable for some other reason. However, the basic fact of legal significance charging the Government with liability in these situations is its retention of benefits in the form of goods or services.[325]

While "equity and justice" certainly lead to this conclusion, what about the mandates from *Merritt v. United States*[326] and *United States v. Mitchell*[327] stating that claims on implied-in-law contracts (quasi-contracts) could not be brought against the United States?

It is difficult to draw a conclusion from this line of decisions because these courts seem to freely grant quantum meruit recoveries on implied-in-law contracts without ever questioning their own jurisdiction to render such a decision.[328] Most of these cases lead to the result that if the plaintiff enters into an express contract with a government official having some measure of authority to bind the government in contract, then, even though the contract is later nullified, the plaintiff will be compensated for the amount by which the government is enriched.[329] Other courts, however, continue to bar implied-in-law claims from being brought against the government.[330]

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325. 320 F.2d at 373 (emphasis added). The court in *Prestex*, however, did not grant any recovery to the plaintiff because "[n]o part of the order was accepted or used by the [government]; nor was it unjustly enriched in any other way." *Id.* at 374.

326. 267 U.S. 338 (1925).

327. 463 U.S. 206 (1983).

328. *See, e.g.*, Campbell v. Tennessee Valley Auth., 421 F.2d 293 (5th Cir. 1969). The court in *Campbell* was more concerned with the measure of a quantum meruit recovery on an implied-in-law contract, rather than whether it had jurisdiction to even hear the claim. Although the dissent mentions the fact that the Court of Claims has no jurisdiction over implied-in-law contracts, nothing more is ever said of it. *Id.* at 304. In addition, the court probably erred in allowing the plaintiff the fair market value of his services when the government official lacked any authority to bind the government in contract. The proper measure of recovery would have been the amount that the government actually benefitted.

329. See Chavez v. United States, 18 Cl. Ct. 540, 547 (1989), where the court struggled with this problem, and adopted this reasoning as a possible *alternative* "theory of contracts implied-in-fact," at least when the federal government is involved. By interpreting the line of cases in this way, the court was able to deny recovery on the basis that the agent purported to have contracted with the plaintiff lacked any authority to do so. *Id.* The *Chavez* court also stated that the decision by the Court of Appeals for the Federal Circuit in *Amdahl* may have merely been that court's use of its equitable powers. *Id.* The Claims Court, as an Article I court, has no such powers. *Id.* The problem with this explanation is that sovereign immunity may negate a court's use of equity against the United States.

330. Many of the decisions in which courts deny recovery on the basis that the claim is for an implied-in-law contract deal with situations in which there was never even an attempt to enter into an express contract with the government. *See, e.g.*, Haberman v. United States, 18 Cl. Ct. 302 (1989); Gray v. Rankin, 721 F. Supp. 115 (S.D. Miss. 1989).

3. *Conclusion — Government Contracts*

The courts continue to struggle with implied-in-law claims, and therefore quantum meruit claims, against the federal government. While the obvious solution would be for Congress to expressly allow such claims, problems would still exist. Permitting implied-in-law claims against the government would reduce the effectiveness of the statutory and regulatory contract procedures. Compliance can often be ensured by placing the burden of compliance on the contracting party, which is in fact what the Tucker Act should do. While the courts also consistently state that recoveries in quantum meruit in these cases should generally be limited to the benefit actually received by the government, many continue to rely upon the price in a contract that they earlier declared void (a fair market value approach).[331] It is undoubtedly, however, unjust for the government to receive a benefit at another's expense, and not be required to pay for it.[332]

D. Palimony

The term "palimony" is generally regarded as loosely embodying any claim by one former cohabitant against another (or the other's estate) for some form of compensation, usually by way of either monetary recompense or acquisition of property.[333] The frequent use

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331. *See* Clark v. United States, 95 U.S. 539 (1877); *Campbell*, 421 F.2d 293. While benefit may sometimes be equated with what was actually requested, in most government contract cases it should not be. When a contracting agent exceeds his authority, for example, he has "requested" something greater than his authorized limit. The government should not be required to adhere to a contract that the agent should not have entered in the first place. Compare this situation to that of a contract entered into between private parties which is later rendered a nullity because of impossibility of performance. In this case the contract price should measure a quantum meruit recovery for any services performed up until the voiding of the contract. *See supra* text accompanying notes 175-78.

332. "Any person who has performed services for the Government, or whose property has been taken, should be compensated . . . . [T]he Government should not retain a free benefit." Wall & Childres, *supra* note 53, at 593.

333. This analysis will be limited to those instances where knowingly unmarried parties cohabitate in a situation where sexual relations are involved. When this is not the case (e.g., a parent and offspring cohabiting), many of the public policy issues are no longer involved. *See, e.g., In re* Estate of Grossman, 27 N.W.2d 365 (Wis. 1947) (addressing a situation where a daughter moved in with her parents in order to care for her sick mother). In addition, when the parties participate in a marriage ceremony and one party has a good faith belief that a valid marriage exists, the concept of a putative spouse may come into play. *See infra* note 335. Finally, occasionally one party has been fraudulently induced to believe that he or she is married, and other remedies can then be utilized by the court. *See, e.g., In re* Fox's Estate, 190 N.W. 90 (Wis. 1922). This section will only deal with those situations where the parties are both aware that they are not legally

of the term is unfortunate, however, in that these recoveries do not normally resemble alimony in any way.[334] Like divorce law, however, cohabitants' rights against one another vary markedly from state to state, depending on the courts' and legislatures' views of the competing public policy interests involved.[335] The results range from a complete denial of recoveries to the recognition of the entire range of legal and equitable remedies.

An initial distinction must be made in these cases between actions for some type of property division and actions for compensation for services rendered (quantum meruit). Often the two situations will overlap, and it can be difficult to discern a distinction. In awarding property to a cohabitant, courts often utilize such principles as constructive or resulting trust, partnership (express or implied), and joint venture, in addition to the contractual-type claims.[336] One of the problems inherent in making the distinction here is that often the underlying basis for a court's award of property is the rendering of services by the plaintiff for the defendant. A court may find an express or implied agreement that, in exchange for the performance of housekeeping and other services, the parties would share equally in any property acquired during the relationship.[337] Additionally,

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married.

334. *Black's Law Dictionary* defines alimony as "[a]llowances which husband or wife by court order pays other spouse for maintenance while they are separated, or after they are divorced (permanent alimony), or, temporarily, pending a suit for divorce (pendente lite)." BLACK'S LAW DICTIONARY 72 (6th ed. 1990).

335. Two concepts that often are an integral part of these cases are common law marriages and putative spouses. A common law marriage is defined as "[a] consummated agreement to marry, between persons legally capable of making marriage contract, per verba de praesenti, followed by cohabitation." BLACK'S LAW DICTIONARY 277 (6th ed. 1990). In addition, most courts require that the parties hold themselves out to the public as being married. *See* Boswell v. Boswell, 497 So. 2d 479 (Ala. 1986). Common law marriage can occasionally be utilized in some of the situations that the present discussion deals with, however it may often be difficult to prove that an agreement to be married existed. In addition, fewer than one-fourth of the states recognize common law marriages. WALTER WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 159 (2d ed. 1990). The concept of a putative spouse occasionally may also be a factor. A putative spouse "may acquire the rights of a legal spouse . . . if he goes through a marriage ceremony and cohabits with another in the good-faith belief that he is validly married." Hewitt v. Hewitt, 394 N.E.2d 1204, 1210 (Ill. 1979). In addition, "[w]hen he learns that the marriage is not valid his status as a putative spouse terminates." *Id. See also* UNIFORM MARRIAGE AND DIVORCE ACT § 209 (1973).

336. *See, e.g.*, Carroll v. Lee, 712 P.2d 923, 927 (Ariz. 1986) (en banc) (noting that the "parties had an implied partnership or joint enterprise agreement"); *In re* Estate of Eriksen, 337 N.W.2d 671, 674 (Minn. 1983) (stating that the "imposition of a constructive trust is justified to prevent unjust enrichment").

337. *See, e.g.*, Levar v. Elkins, 604 P.2d 602 (Alaska 1980). It should also be noted that in a large number of cases the parties have also both contributed to the purchase price of the property

the rendition of services may give rise to a claim for unjust enrichment, which a court will sometimes remedy by means of a constructive trust.[338] The principles underlying many of these property claims, however, are identical to those involved in quantum meruit claims, namely express or implied (in fact) contracts, and unjust enrichment (contracts implied in law).[339] Often the distinction can be traced to the fact that the person performing services was doing so with the expectation of sharing in any property acquired, as opposed to an expectation of monetary compensation.[340] As will be discussed shortly, such an expectation of compensation, either by sharing in property or by monetary payment, is usually necessary before a quantum meruit recovery can be obtained.

At the outset it is important to keep in mind one principle that is followed by most courts (at least in some form): "A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal."[341] How the courts implement this rule, however, leads directly to many of the variances that are observed. It is with this background in mind that the range of results can be examined.

1. Complete Denial of Recovery

The most hostile reaction to unmarried cohabitants' recoveries from their former partners is that of the Supreme Court of Illinois. In *Hewitt v. Hewitt*,[342] the court unequivocally stated that under no circumstances would it countenance the maintenance of such claims.

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in question, which is certainly another significant factor in a court's decision on property rights.

338. *See, e.g., In re* Estate of Eriksen, 337 N.W.2d 671 (Minn. 1983). As one Canadian author noted, the equitable remedy of constructive trust should be utilized in these cases when the services are "referrable to the property claimed to be the subject matter of the trust." Christine Davies, *Unjust Enrichment and the Remedies of Constructive Trust and Quantum Meruit*, 25 ALTA. L. REV. 286, 294 (1987).

339. For a more complete treatment of cohabitants' property claims, see Joel E. Smith, Annotation, *Property Rights Arising From Relationship of Couple Cohabiting Without Marriage*, 3 A.L.R.4TH 13 (1981). See also *supra* text accompanying note 39 for implied-in-fact contracts and *supra* text accompanying notes 40-41 for implied-in-law contracts.

340. *See, e.g.*, Watts v. Watts, 405 N.W.2d 303, 313 (Wis. 1987) (concluding that the plaintiff sufficiently stated a claim for "defendant's breach of an express or an implied in fact contract to share with the plaintiff the property accumulated through the efforts of both parties during their relationship").

341. RESTATEMENT OF CONTRACTS § 589 (1932). It is interesting to note that this provision was left out of the *Restatement (Second) of Contracts*, however the courts continue to rely on this "rule of illegality." *See* Hewitt v. Hewitt, 394 N.E.2d 1204, 1208 (Ill. 1979); *Watts*, 405 N.W.2d at 311 (Wis. 1987).

342. 394 N.E.2d 1204 (Ill. 1979).

Although the plaintiff in *Hewitt* was seeking to recover "an equal share of the profits and property accumulated by the parties,"[343] and as such was not technically basing her claim on quantum meruit, the opinion forecloses any possibility of a successful quantum meruit claim for services rendered.

Victoria and Robert Hewitt lived together "in an unmarried family-like relationship" for fifteen years.[344] Three children were born out of this relationship, and the Hewitts "held themselves out as husband and wife."[345] Victoria further alleged that she had assisted Robert in establishing his career, and that in return he promised to "share his life, his future, his earnings and his property" with her.[346] Victoria's claims were based on an express contract, an implied-in-fact contract, fraud, and unjust enrichment.[347]

In denying plaintiff recovery, the court quoted the "rule of illegality" referred to above whereby contracts whose consideration involves sexual relations are facially invalid.[348] Although the court conceded that the parties may form a contract independent of the sexual relations, it had great difficulty in finding a contract "separate and independent from the sexual activity," relegating such a proposal to the recognition of common law marriage which had previously been abolished by the Illinois legislature.[349] Moreover, the court found that recognizing property rights of unmarried cohabitants would directly contravene the public policy of the state as indicated by the state's domestic relations laws.[350] The court felt that

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343. *Id.* at 1205.

344. *Id.*

345. *Id.*

346. *Id.*

> [I]n reliance on defendant's promises she devoted her efforts to his professional education and his establishment in the practice of pedodontia, obtaining financial assistance from her parents for this purpose . . . she assisted defendant in his career with her own special skills and although she was given payroll checks for these services she placed them in a common fund.

Id.

347. *Id.*

348. *Id.* at 1208.

349. *Id.* at 1209.

> [I]t would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naivete we believe involved in the assertion that there are involved in these relationships contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity.

Id.

350. *Id.* at 1207-11. "[W]e believe that the appellate court decision in this case contravenes the Act's policy of strengthening and preserving the integrity of marriage." *Id.* at 1209.

any change in this area should be done by the legislature itself, and not by a court.[351]

The decision in *Hewitt,* while not explicitly dealing with a quantum meruit claim for services, is by far the most limiting decision to date in the area of palimony. The Illinois Supreme Court unequivocally dismissed the plaintiff's claims based on express contract, implied-in-fact contract, and unjust enrichment (quasi contract),[352] which are the three bases for quantum meruit claims. Its strong stance clearly indicates that any claim arising out of the cohabitation of knowingly unmarried cohabitants, whether for property or for monetary compensation, will have a short life in Illinois.[353]

2. *Recognition of Express Agreements Between Cohabitants*

Although most recent cases do not create an outright ban on all such recoveries, their impact sometimes nearly amounts to such since they require an express agreement before compensation is awarded. It is the unusual case where unmarried cohabitants enter into an express contract concerning the rendition of and the payment for services,[354] and without such an agreement no right to recovery may exist in some jurisdictions. While courts often circumvent the "rule of illegality" referred to previously by stating that a contract between cohabitants is valid if the contract is "independent of the illicit relationship,"[355] a second hurdle must be overcome

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351. *Id.* at 1211.

352. *Id.*

353. An appellate court decision in Illinois has suggested a possible limit on the breadth of the *Hewitt* decision. *See* Spafford v. Coats, 455 N.E.2d 241 (Ill. App. Ct. 1983). In *Spafford,* the court permitted the plaintiff to assert a claim to property which she had personally paid for but was titled in the name of her cohabitant. *Id.* at 245-46. In finessing its way around *Hewitt,* the court stated that "where the claims do not arise from the relationship between the parties and are not rights closely resembling those arising from conventional marriages, we conclude that the public policy expressed in *Hewitt* does not bar judicial recognition of such claims." *Id.* at 245. It is uncertain what effect, if any, this decision would have on a quantum meruit claim by a cohabitant for services rendered.

354. *Hewitt,* 394 N.E.2d at 1207 ("[I]t is unlikely that most couples who live together will enter into express agreements regulating their property rights.").

355. *In re* Estate of Steffes, 290 N.W.2d 697, 709 (Wis. 1980).

> A bargain between two people is not illegal merely because there is an illicit relationship between the two so long as the bargain is independent of the illicit relationship and the illicit relationship does not constitute any part of the consideration bargained for and is not a condition of the bargain.

Id. See also Morone v. Morone, 413 N.E.2d 1154, 1156 (N.Y. 1980) (stating that New York has long accepted express contracts between unmarried cohabitants when "illicit sexual relations" were not part of the consideration).

when an express contract cannot be proven.

The major obstacle that has caused these courts to permit only recoveries on express contracts is the problem of gratuitousness. When services are rendered gratuitously to another, it should be obvious that no implied-in-fact contract to pay for the services can exist. Likewise, a court will not find an implied-in-law contract when the services are rendered gratuitously because there has been no *unjust* enrichment.[356] In other words, before services will be compensated, at the very least the performing party must have some expectation that there will be compensation for the work. In examining claims by cohabitants, nearly every court has established a presumption that the relationship between the cohabitants "makes it natural that the services were rendered gratuitously,"[357] at least when the services involved are in the nature of housekeeping, cooking, companionship, etc. Several courts have refused to permit this presumption to be overcome, thereby precluding implied-in-fact and implied-in-law contracts, because of the problems of proof involved.

In *Morone v. Morone*,[358] the highest court of New York permitted a claim on an express contract to be brought for services performed by a cohabitant, even if the contract was only oral. The court, however, refused to permit an implied-in-fact contract action to be brought. The New York court stated:

> Absent an express agreement, there is no frame of reference against which to compare the testimony presented and the character of the evidence that can be presented becomes more evanescent. There is, therefore, substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratui-

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356. WOODWARD, *supra* note 40, at 74, 313-14. *See also* Marvin v. Marvin, 557 P.2d 106, 123 (Cal. 1976) ("[A] nonmarital partner may recover in quantum meruit."); Roznowski v. Bozyk, 251 N.W.2d 606, 608 (Mich. Ct. App. 1977) ("Without proof of the expectations of the parties, the presumption of gratuity will overcome the usual contract implied by law to pay for what is accepted."); Suggs v. Norris, 364 S.E.2d 159, 161 (N.C. Ct. App. 1988) (allowing "recovery in quantum meruit where the plaintiff can show that the services were rendered with an expectation of monetary compensation").

357. *Morone*, 413 N.E.2d at 1157. *See also In re* Estate of Steffes, 290 N.W.2d 697 (Wis. 1980). The *Steffes* court stated:

> The basis for applying the presumption of gratuitous service to persons cohabiting but not related by marriage is that in the ordinary course of life persons living together in a close relationship perform services for each other without expectation of payment in the usual sense because the parties mutually care for each other's needs and perform services for each other out of a feeling of affection or a sense of obligation.

Id. at 703.

358. 413 N.E.2d 1154.

tously and what compensation, if any, the parties intended to be paid.[359]

While the court acknowledged that proof of an express contract would also be problematic, it apparently felt that this would be manageable.[360] This same reasoning has persuaded courts of other jurisdictions in a similar fashion,[361] and the legislatures of Minnesota and Texas have gone so far as to require all agreements between cohabitants concerning property and financial matters to be in writing.[362]

3. *Complete Recognition of Quantum Meruit Recovery*

Many courts today will permit claims to be brought in quantum meruit on express, implied-in-fact, and implied-in-law contracts.[363] Although the celebrated case of *Marvin v. Marvin*[364] has had much to do with the liberalization of many courts' views, quantum meruit recoveries on express as well as implied contracts had been recognized occasionally well before the California court's decision.[365]

Even with this generous view of quantum meruit claims between unmarried cohabitants, however, a couple of obstacles must still be overcome. The presumption of gratuitousness still remains a factor in determining whether an implied-in-fact or implied-in-law contract will exist. An implied-in-fact contract between the parties can only exist when both expected that the performing party would be compensated.[366] Once again the problem is one of proof. Courts are often confronted with ambiguous "promises" such as the assurance

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359. *Id.* at 1157. The *Morone* court went on to state that this was precisely the reason why New York (and many other jurisdictions) had abolished common law marriage. *Id.* at 1157-58.

360. This may not be the case when the plaintiff is suing a deceased cohabitant's estate, as the problems of proof become nearly equivalent to those that the *Morone* court felt existed in implied contract claims. *See, e.g.*, Neumann v. Rogstad, 757 P.2d 761, 764 (Mont. 1988) ("[C]ourts have long struggled with belated claims by family members and others against a person whose 'mouth is stopt with dust.' ").

361. *See, e.g.*, Tapley v. Tapley, 449 A.2d 1218 (N.H. 1982).

362. MINN. STAT. § 513.075 (1990); TEX. BUS. & COM. CODE ANN. § 26.01 (West 1990). For a discussion of these provisions, see Buddy Brixey, Comment, *Texas Legislation on the Statute of Frauds in Palimony Suits: Is an Oral Contract Worth the Paper It's Written On?*, 25 HOUS. L. REV. 979 (1988).

363. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Suggs v. Norris, 364 S.E.2d 159 (N.C. Ct. App. 1988); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987). Many of these courts never properly label the claims being brought as quantum meruit, however, and others only mention quantum meruit in passing.

364. 557 P.2d 106 (Cal. 1976).

365. *See, e.g., In re* Anderson's Estate, 7 N.W.2d 823 (Wis. 1943).

366. *See supra* text accompanying notes 38-39.

that one cohabitant would "be taken care of" in return for the furnishing of housekeeping services.[367] Courts seem to vary widely in their receptiveness to this type of testimony, and often their decisions will turn on the type of services that were furnished.[368] If the work for which compensation is being sought consists of housekeeping, cooking, companionship, or the like, courts seem to be more reluctant to find an implied-in-fact contract.[369] If, on the other hand, one cohabitant works for the other's business enterprise, the burden of rebutting the gratuitousness presumption may be less.[370] Because many claimants for palimony compensation are women, the courts' reluctance to value services associated with the home and family can be seen as an example of sexism — the devaluation of work in what is seen as the woman's separate sphere, the sphere of the personal and private, as opposed to the public male sphere which would include a business enterprise.[371]

For a court to uphold a claim on an implied-in-law contract, it must be shown only that the party rendering services expected to be compensated in some way. A second problem exists however. If the party rendering services also received some benefit through the relationship, then the value of that benefit must be subtracted from the value of the work performed.[372] This is often fatal to implied-in-law claims by cohabitants, as was the case in *Marvin*.[373] If one party is performing housekeeping services while the other is the sole monetary provider to the relationship, the court may find that the benefit received by the "stay-at-home" partner outweighed any value of the housekeeping services.[374]

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367. Johnston v. Estate of Phillips, 706 S.W.2d 554, 556 (Mo. Ct. App. 1986). Although there were some witnesses that testified as to these promises, the court found the evidence insufficient to establish an implied-in-fact contract. *Id.* at 558-59.

368. Roznowski v. Bozyk, 251 N.W.2d 606, 608 (Mich. Ct. App. 1977) ("The issue is a question of fact, to be resolved by consideration of all of the circumstances, including the type of services rendered.").

369. *See* Suggs v. Norris, 364 S.E.2d 159, 161 (N.C. Ct. App. 1988) (affirming the trial court, which denied the plaintiff's claims for housekeeping services but permitted the plaintiff to recover for services performed in a produce business with the defendant).

370. *See, e.g.*, Estate of Erickson, 722 S.W.2d 330 (Mo. Ct. App. 1986).

371. J. RALPH LINDGREN & NADINE TAUB, THE LAW OF SEX DISCRIMINATION 7 (1988).

372. Marvin v. Marvin, 557 P.2d 106, 122-23 (Cal. 1976). ("[A] nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received.").

373. 557 P.2d 106 (Cal. 1976).

374. See *supra* text accompanying note 371 for a discussion of the sexism implicit in this distinction.

CONCLUSION

The courts continue to struggle with quantum meruit claims, and it is the hope of the author that this Article may help to alleviate some of the confusion. As should be apparent, however, the basic principles are not always followed in certain instances. While some of these divergences are simply misunderstandings of the applicable rules, others are dictated by the peculiarities of the situation. Public policy often requires modification of the use of quantum meruit in certain instances such as physicians' and attorneys' fees and palimony. It is also interesting to note that just as the development of quantum meruit itself first occurred in areas that were highly regulated by governmental authority (i.e., the common callings), today's deviations and novel approaches are occurring in fields that often require more scrutiny. While many decisions are difficult to justify, and likely will be short-lived, others may be the beginning of future developments in the use of quantum meruit. Contrary to what some may believe, quantum meruit is not a dead issue — it simply is struggling beneath its own complexity.

It is the author's contention that this complexity and confusion can be seen as positive. It demonstrates necessary flexibility in the law. This Article has been a chronicle of the evolution and current application of this flexibility. Quantum meruit is equity's flexibility in law. As Portia contrasted justice and mercy, so has this Article contrasted law and equity. The unique aspect of quantum meruit is that it is concerned with remedy, with penalty. As Portia stated, when dressed like a doctor of laws:

> For the intent and purpose of the law
> Hath full relation to the penalty . . . .[375]

If we can see penalty as legal remedy, then quantum meruit is the flexibility in that remedy, the quality of mercy which is not strained.

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375. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1, ll. 247-48 (William Lyon Phelps ed., 1923).